IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 50

Civil Appeal No 117 of 2017

Between

LEE TAT DEVELOPMENT PTE LTD

… Appellant

And

MANAGEMENT CORPORATION OF GRANGE HEIGHTS STRATA TITLE PLAN NO 301

… Respondent

In the matter of Suit No 1087 of 2012

Between

LEE TAT DEVELOPMENT PTE LTD

… Plaintiff

And

MANAGEMENT CORPORATION OF GRANGE HEIGHTS STRATA TITLE PLAN NO 301

… Defendant

JUDGMENT

[Tort] — [Abuse of process]
[Tort] — [Malicious falsehood]
[Tort] — [Malicious prosecution]
[Tort] — [Trespass] — [Land]

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Lee Tat Development Pte Ltd
v
Management Corporation Strata Title Plan No 301

[2018] SGCA 50

Court of Appeal — Civil Appeal No 117 of 2017
Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA, Chao Hick Tin SJ and Chan Seng Onn J
28 February 2018

17 August 2018 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2017] SGHC 121 ("the Judgment"). As the Judge observed (at [1]), this is yet another legal tussle in a series of bitterly fought litigation between the parties which stretches across more than four decades and which has hitherto resulted, *inter alia*, in *five* decisions of this court, excluding the present decision. In the last of those decisions, this court characterised the protracted quarrel between the parties as a "marathon saga of litigation" (*Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998 at [3]). At this juncture, some seven years and yet another set of proceedings later, it seems appropriate to say, in the words of Herman

Melville, that it is a "quenchless feud" (Herman Melville, *Moby-Dick; or, The Whale* (Norton, 1892) at p 169).

2 In fact, the appellant had in 2008 ultimately obtained a decision in its favour with regard to the principal subject matter of their longstanding quarrel, namely, a disputed right of way over a narrow strip of land. Now that there is no longer any dispute over that original subject matter, the parties have turned their energies to disputing about the dispute itself. This time, the proceedings which culminated in the present appeal were commenced by the appellant, the owner of that strip of land, who has claimed against the respondent, who had been found not to have that right of way despite years of asserting that it did, in four causes of action, *viz*, abuse of process, malicious prosecution, malicious falsehood and trespass.

3 These proceedings are, in fact, replete with irony as well as legal significance. It is ironic that a dispute bitterly fought over several decades by two parties who have nothing but personal ill will towards each other has engendered (for Singapore law) questions of the first importance in relation to the development of the common law in general and tort law in particular. More specifically, of threshold importance to the appellant's claims for abuse of process and malicious prosecution is the issue of whether these torts ought to be *recognised* by the Singapore courts *in the first place*. If this court does not recognise the existence of these torts in the Singapore context, then the appellant's case would not even be able to take off.

4 ***At least two sub-issues*** arise in relation to this particular issue – ***first***, whether the Singapore courts ought to recognise either or both torts simply because there is *case law* that endorses both them – and, in relation to one of the torts, case law that endorses the tort in a number of *narrower* situations. Put

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simply, does this last-mentioned point raise a "*Donoghue v Stevenson* moment"? To elaborate, it is well known that the landmark House of Lords decision of *M'Alister (or Donoghue) (Pauper) v Stevenson* [1932] AC 562 ("*Donoghue*") birthed the modern law of negligence (albeit by a bare majority of three to two). In the process of arriving at its decision, the majority in *Donoghue* considered several streams of seemingly disparate precedents, drawing together a central thread via the now famous "neighbour principle" laid down by Lord Atkin (see also the classic account (albeit from an American perspective) by Prof Edward H Levi in his book, *An Introduction to Legal Reasoning* (The University of Chicago Press, 1949), especially at pp 8−27 and ch 3 of Robert C Beckman, Brady S Coleman and Joel Lee, *Case Analysis and Statutory Interpretation – Cases and Materials* (Faculty of Law, National University of Singapore, 2nd Ed, 2001), as well as the decision of this court in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang*") at [80]). It is important to note that in *Donoghue*, the various precedents were indeed flowing (albeit as separate streams) in the *same direction*. It was therefore logical as well as fair and just for the court in *Donoghue* to gather together, as it were, those disparate smaller streams and channel them into the more powerful river that we now know as the tort of negligence. To state that this was a significant moment in the development of the common law of torts is an understatement of the highest order. Indeed, since *Donoghue*, the law of negligence has constituted the most important part of the law of tort and takes centre stage in textbooks and case books as well as in law schools across the Commonwealth.

5 As we shall see, there are possible parallels in the case before us. One of the principal (and relatively recent) decisions that has endorsed the *extension* of the tort of ***malicious prosecution*** to the ***civil*** *sphere* is that of the Judicial

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Committee of the Privy Council (on appeal from the Court of Appeal of the Cayman Islands) in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366 ("*Crawford Adjusters*") (noted by Tom K C Ng in "The Torts of Malicious Prosecution and Abuse of Legal Process" (2014) 130 LQR 43 and discussed by Stephen Todd in "Liability for the Malicious Institution of Civil Proceedings" (2017) 4 J Int'l & Comp L 123 ("*Todd*")), where the Board held in favour of the aforesaid extension – though only (as was also the case in *Donoghue*) by a *narrow majority of three to two*. Indeed, the decision in *Crawford Adjusters* was subsequently endorsed in the UK Supreme Court decision of *Willers v Joyce and another* [2016] 3 WLR 477 ("*Willers*"; discussed in *Todd* and James Lee, "The Judicial Individuality of Lord Sumption" (2017) 40 UNSW Law Journal 862 ("*James Lee*") at pp 880−886) – again by a *narrow majority of five to four* (with *all five* of the judges who sat on *Crawford Adjusters* also sitting on this particular appeal (for further proceedings, see *Willers v Joyce* [2017] EWHC 1225 (Ch))).

6 By way of a side-note of sorts, the UK Supreme Court in fact delivered (in relation to *Willers*) a *second* decision devoted exclusively to the issue of *stare decisis* or binding precedent which suggested that, in certain circumstances, the Judicial Committee of the Privy Council could effectively decide that courts in England and Wales should follow its decision rather than the earlier decision of the House of Lords, the UK Supreme Court or of the English Court of Appeal on *a point of* ***English*** *law* (see *Willers v Joyce (No 2)* [2016] 3 WLR 534, especially at [19]−[21]). Although such an approach has not escaped academic criticism (see Peter Mirfield, "A Novel Theory of Privy Council Precedent" (2017) 133 LQR 1), it rests on a *practical* basis. As Lord Neuberger of Abbotsbury (with whom all the other judges agreed) observed (at [21]):

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> … [I]t seems to me to be not only convenient but also sensible that the [Judicial Committee of the Privy Council], which normally consists of the same judges as the [UK] Supreme Court, should, when applying English law, be capable of departing from an earlier decision of the [UK] Supreme Court or House of Lords to the same extent and with the same effect as the [UK] Supreme Court.

7 It is trite, though, that the Singapore courts are not bound to follow decisions of either the Judicial Committee of the Privy Council emanating from another jurisdiction or the UK Supreme Court. We are hence *not* bound to follow either *Crawford Adjusters* or *Willers*.

8 What will be of crucial importance in our analysis below is whether the various precedents which applied the tort of malicious prosecution in the *civil* sphere were indeed flowing in the *same direction* (as was the case with the precedents prior to *Donoghue*) ***or*** whether they were *distinct streams that were flowing in separate directions* (*ie*, were *specific historical* developments and no more) and therefore not susceptible of being consolidated and harnessed into a more effective river, as was done in *Donoghue*. We should pause to point out that one area of difference is that whereas *Donoghue* birthed a completely novel cause of action, by some accounts, the application of the tort of malicious prosecution to civil proceedings is nothing new. Indeed, the majority in *Crawford Adjusters* pointed out that there were prior cases that had endorsed the application of the tort of malicious prosecution in the civil sphere on an apparently general basis – although they, too, acknowledged that that was, by the time of the decision in *Crawford Adjusters*, *no longer* the law. However, as we shall also see, the minority in the same case (in particular, Lord Sumption) advanced an argument from history to demonstrate the contrary, that the tort had never been of such general application. What is clear is that the Board in *Crawford Adjusters* (and, subsequently, the UK Supreme Court in *Willers*) were faced directly with the issue as to whether the tort of ***malicious prosecution***

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should (by way of a clear and unambiguous declaration of what the law should be) be ***extended*** to the ***civil*** *sphere* ***generally***. Looked at in this light, the Board in *Crawford Adjusters* (and, subsequently, the UK Supreme Court in *Willers*) were indeed faced with a "*Donoghue v Stevenson* moment". This is, *a fortiori*, the case as far as the *Singapore* position is concerned.

9 We pause to observe that the first sub-issue (see [4] above) outlined in the preceding paragraphs is also relevant to whether the tort of ***abuse of process*** ought to be introduced in the Singapore context, although it is not as important in relation to this particular tort as the second sub-issue, to which our attention must now turn.

10 The ***second*** sub-issue is this: Whether, regardless of the precedents themselves, there are ***persuasive arguments of general principle, policy, logic as well as justice and fairness*** that would lead, on balance, to the conclusion that the tort of malicious prosecution ought to be extended to the *civil* sphere, and that the tort of abuse of process ought to be recognised in the Singapore context. In this regard, we will also consider the judgments in both *Crawford Adjusters* and *Willers*. We should mention that, whilst a parochial approach to legal development ought to be assiduously eschewed, this court cannot ignore – where relevant – the lack of suitability of any rule or principle of English law to the *local circumstances of Singapore* (see also s 3(2) of the Application of English Law Act (Cap 7A, 1994 Rev Ed)).

11 In considering the possible recognition of the torts of malicious civil prosecution and abuse of process in Singapore, we bear in mind the oft-quoted observations by Denning LJ (as he then was) in the English Court of Appeal decision of *Candler v Crane, Christmas & Co* [1951] 2 KB 164, where the learned judge drew (at 178) a distinction between "timorous souls who were

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fearful of allowing a new cause of action" and "bold spirits who were ready to allow it if justice so required". These observations have, in fact, been quoted more than once by this court itself (see, *eg*, *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 ("*Ang Sin Hock*") at [80]; *Lim Meng Suang* at [80]; and *ATE v ATD and another appeal* [2016] SGCA 2 at [27]). However, there is a *limit* to judicial law making. As this court observed in *Ang Sin Hock* (at [80]):

> To adopt phrases coined by Denning LJ in a slightly different context, judges can be "bold spirits", as opposed to "timorous souls" – but *only*, we would reiterate, *where there is a legal basis for such judicial boldness which would (in turn) aid in achieving a substantively just and fair result in the case at hand.* [emphasis in original]

12 Indeed, perhaps the expression "wise spirits" instead of "bold spirits" might be a preferable term. Put another way, if the recognition of the aforementioned torts would lead to more difficulties as well as complexities within Singapore law itself, it would then be *unwise*, to say the least, for this court to proceed to recognise these torts. Indeed, such a situation would mandate a *non*-recognition of these torts instead.

13 With this overview, we turn to outline the factual backdrop to this case.

Facts

14 The appellant is Lee Tat Development Pte Ltd ("Lee Tat"). The respondent is the management corporation of the condominium development, Grange Heights ("the MCST"). The long-running legal dispute between Lee Tat and the MCST concerns a narrow strip of land ("the Servient Tenement").

15 Tracing the origins and winding course of the dispute calls for a brief description of the lay of the land. As shown in the diagram below, Grange

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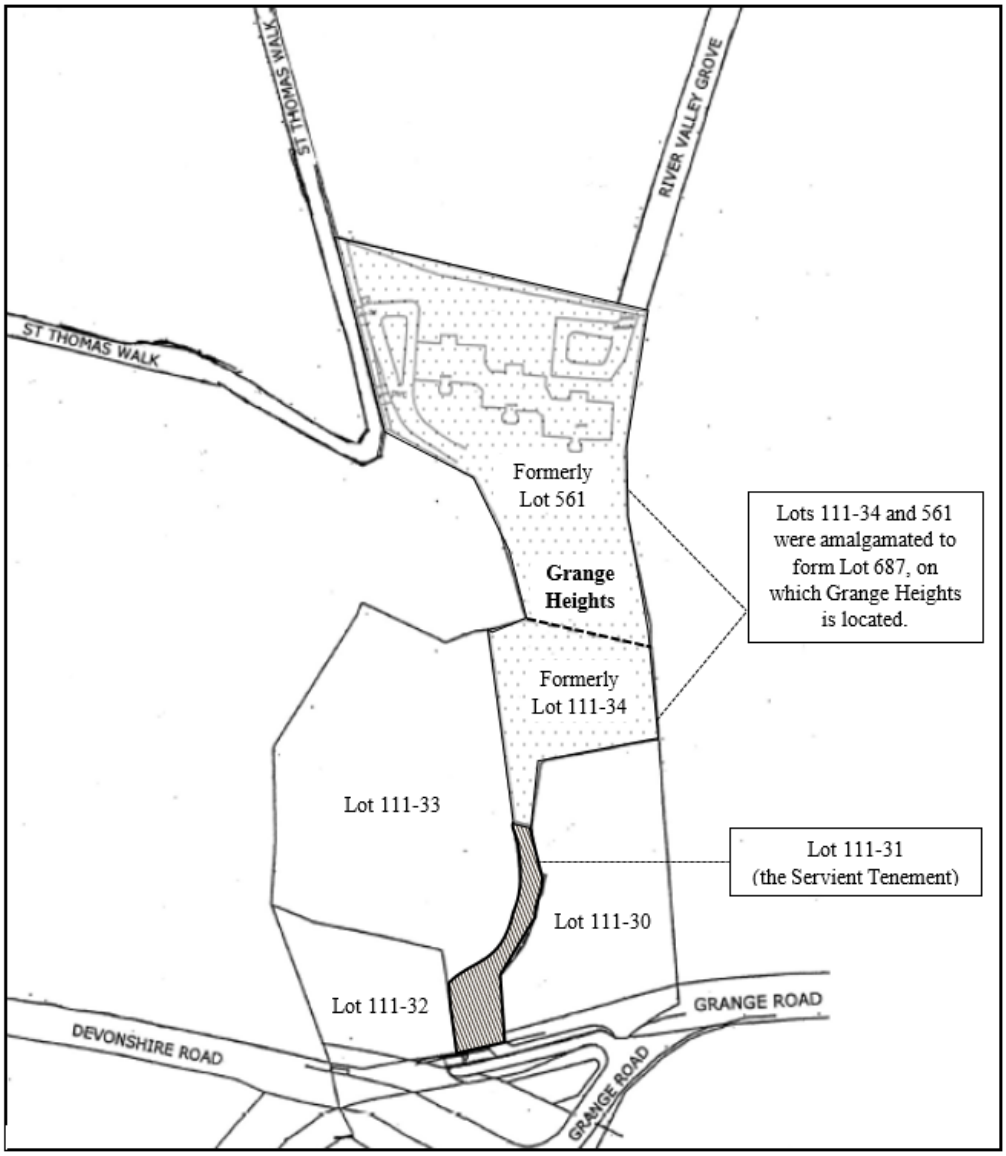
Heights sits on a plot designated Lot 687 (the dotted area), which comprises what were formerly two separate pieces of land, namely Lots 111-34 and 561.



As can be seen, Lot 687 has no access to Grange Road except via Lot 111-31 (the shaded area), *ie*, the Servient Tenement, which lies between what was formerly Lot 111-34 and Grange Road. This means that for Grange Heights residents, the most direct method of accessing Grange Road is to pass through

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the Servient Tenement. The question at the heart of the protracted tussle between Lee Tat and the MCST was whether Grange Heights residents had this right of way ("the Right of Way"). In successive rounds of litigation, the MCST maintained that Grange Heights residents did have it. On the other hand, Lee Tat, which initially owned only two dominant tenements, Lots 111-32 and 111-33 (shown to the left of the Servient Tenement), but subsequently acquired the Servient Tenement itself, maintained that Grange Heights residents had no such Right of Way, and sought to exclude them from using the Servient Tenement.

16 The issue whether Grange Heights residents had the Right of Way is intertwined with changes in ownership of the various lots of land over time. Lots 111-30, 111-31 (*ie*, the Servient Tenement), 111-32, 111-33 and 111-34 were originally owned by a company called Mutual Trading Ltd ("Mutual Trading"). In 1919, Mutual Trading sold Lots 111-30, 111-32, 111-33 and 111-34 ("the Dominant Tenements") and granted a right of way over the Servient Tenement to the purchasers of the Dominant Tenements. In this way, owners of Lot 111-34 came to enjoy the Right of Way over the Servient Tenement.

17 In 1970, Hong Leong Holdings Ltd ("HLH"), the developer of Grange Heights and the MCST's predecessor in title, acquired Lots 111-34 and 561. The two lots were amalgamated into Lot 687 in 1976. It should be noted that the residential units within Grange Heights were built on what was formerly Lot 561, while the tennis courts and changing rooms were constructed on what was formerly Lot 111-34.

18 Lee Tat, which was then known as Collin Development Pte Ltd ("Collin"), acquired Lots 111-32 and 111-33 in 1973. It later also purchased the Servient Tenement on 27 January 1997.

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The history of litigation between the parties

19 The present set of proceedings was preceded by five rounds of litigation between the parties. These shall be referred to as "the First Action" to "the Fifth Action" respectively, in chronological order of commencement. We foreshadow, however, that the Fourth Action was heard and decided before the Third Action.

The First Action

20 The First Action was brought by Collin against HLH in 1974, when Grange Heights was under construction. At the time, Collin had recently acquired Lots 111-32 and 111-33, but did not own the Servient Tenement. Collin sought a declaration that HLH and its employees, as well as Grange Heights residents, were not entitled to use the Servient Tenement. HLH counterclaimed for a declaration that it enjoyed the Right of Way. The matter was heard at first instance by F A Chua J. In *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1974–1976] SLR(R) 618 ("*Grange Heights (No 1) (HC)*"), he dismissed Collin's claim on the basis that HLH had not substantially interfered with Collin's enjoyment of the Right of Way (at [22]). Chua J also dismissed HLH's counterclaim on the ground that the declarations sought by HLH could not be made against Collin because the latter was not the owner of the Servient Tenement (at [24]). His decision was affirmed by the Court of Appeal in *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1974–1976] SLR(R) 806.

The Second Action

21 The Second Action was commenced by the MCST in April 1989. By this time, Lots 111-34 and 561 had been amalgamated, the MCST had become

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the owner of Lot 687, and Collin had renamed itself Lee Tat. Lee Tat owned Lots 111-32 and 111-33, but it did not yet own the Servient Tenement.

22 The Second Action was prompted by Lee Tat's instalment of an iron gate and fence across the ends of the Servient Tenement. The MCST reacted by applying for an injunction to restrain Lee Tat from restricting its access to the Servient Tenement. Lee Tat raised two contentions in response:

(a) first, that the amalgamation of Lot 111-34 and Lot 561 had extinguished the MCST's Right of Way ("the Amalgamation Issue"); and

(b) secondly, that Grange Heights residents were not entitled to use the Servient Tenement because the residential apartments stood on Lot 561, and the benefit of the Right of Way did not extend from Lot 111-34 to Lot 561, as the latter was not one of the Dominant Tenements ("the Extension Issue").

23 The Second Action was heard by Punch Coomaraswamy J. In *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [1990] 2 SLR(R) 634, Coomaraswamy J held that the amalgamation of Lots 111-34 and 561 had not extinguished the MCST's Right of Way (at [8]). He also found that Lee Tat was not entitled to close the Right of Way because it was not the owner of the Servient Tenement and did not complain of excessive use of the Servient Tenement (at [9]–[10]). He therefore granted an injunction restraining Lee Tat from interfering with the MCST's Right of Way (at [11]). This decision was affirmed by the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [1992] 3 SLR(R) 1

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("*Grange Heights (No 2) (CA)*"), which judgment was released in September 1992.

24 It must be noted that *whilst Coomaraswamy J determined the Amalgamation Issue in favour of the MCST,* ***he did not address the Extension Issue***. The Court of Appeal also did not address the Extension Issue in *Grange Heights (No 2) (CA)*. The significance of this point will become clear shortly.

The Third and Fourth Actions

25 The Third Action was commenced on 4 June 2004 by the MCST. By this time, Lee Tat had become the owner of the Servient Tenement (in 1997). In the Third Action, the MCST sought a declaration that it was entitled to repair and maintain the Right of Way, which had allegedly fallen into disrepair.

26 Soon after the commencement of the Third Action, Lee Tat commenced the Fourth Action on 26 June 2004. It sought various reliefs, including a declaration that the Right of Way could not be used for access to Lot 687, and a permanent injunction preventing Grange Heights residents from using the Right of Way.

27 By agreement of the parties, the Fourth Action was heard before the Third Action. In the proceedings, Lee Tat again raised the Extension Issue, submitting that the Right of Way could not be used for the benefit of Lot 561. In this regard, it cited *Harris v Flower and Sons* (1904) 91 LT 816 ("*Harris v Flower*") for the principle that a right of way which is granted over a servient tenement in favour of a dominant tenement cannot be used for the purposes of a non-dominant tenement, as this would exceed the rights of the dominant owner as defined by the terms of the grant ("the *Harris v Flower* principle"). The Fourth Action was heard by Woo Bih Li J at first instance. His judgment is

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found at *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2004] 4 SLR(R) 828 ("*Grange Heights (No 4) (HC)*"). Woo J held that the judgments in the Second Action had determined whether Grange Heights residents could use the Right of Way to gain access not only to Lot 111-34 but also to Lot 561 (at [30] and [37]). He considered that this gave rise to an issue estoppel which meant that Lee Tat was not entitled to raise this issue afresh in the Fourth Action (at [43]).

28 On appeal, the Court of Appeal affirmed Woo J's decision in the Fourth Action by a two-to-one majority. That decision is found at *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 ("*Grange Heights (No 4) (CA)*"). The majority agreed with Woo J that an issue estoppel had arisen because the judgments in the Second Action had "finally and conclusively determined" that Grange Heights residents enjoyed the Right of Way over the Servient Tenement (*Grange Heights (No 4) (CA)* at [2]).

29 Chao Hick Tin JA dissented, and took the view that no issue estoppel had arisen. He noted that the First and Second Actions had been decided at a time when Lee Tat was the owner of only two dominant tenements (*ie*, Lots 111-32 and 111-33), and not the owner of the Servient Tenement. The courts in the First and Second Action had therefore approached the issue purely as a matter of whether the use of the Servient Tenement by HLH or Grange Heights residents had interfered with Lee Tat's rights and interests as owner of Lots 111-32 and 111-33 (at [68]–[69]). Yet the rights of the owner of a servient tenement were different from those of an owner of a dominant tenement, and the issue had not been decided as between the MCST and Lee Tat *in its capacity as owner of the Servient Tenement*. While Lee Tat had raised the Extension Issue in the Second Action, it had not been ruled upon because Lee Tat "could not really

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raise the issue of trespass", given that its rights were, at the time, purely those of the owner of a dominant tenement (*Grange Heights (No 4) (CA)* at [74]). Therefore, Lee Tat was not estopped from re-litigating this issue (at [82]). Applying the *Harris v Flower* principle, Chao JA held that Grange Heights could not extend the Right of Way to benefit Lot 561 because under the terms of the original grant, the Right of Way applied to only Lot 111-34 (at [61]).

30 Following the conclusion of the Fourth Action, the Third Action came for hearing before Woo J. In *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2007] 2 SLR(R) 554 ("*Grange Heights (No 3) (HC)*"), Woo J held that the MCST was entitled to repair and maintain the Servient Tenement (at [6]).

31 Woo J's decision was set aside by the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875 ("*Grange Heights (No 3) (CA)*"). As the Judge noted, this was the point at which "[t]he tide turned" (see the Judgment at [23]). In that decision, this court held that the majority of the Court of Appeal in the Fourth Action had erred in finding that issue estoppel arose. This court agreed with Chao JA's dissenting judgment in the Fourth Action (*Grange Heights (No 3) (CA)* at [44] and [67]). As Lee Tat's arguments in these appeals rely heavily on what was decided by the Court of Appeal in the Third Action, we summarise the findings reached in that decision in some detail:

(a) First, there was no need for the High Court and the Court of Appeal in the Second Action to decide the Amalgamation Issue. The MCST and Lee Tat were, at the time, fellow owners of dominant tenements, and neither was in a position to question the existence of the Right of Way *vis-à-vis* the other. Only an owner of the Servient

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Tenement could have done this. In so far as the courts in the Second Action had decided the Amalgamation Issue, such a decision bound Lee Tat only as the owner of Lots 111-32 and Lot 111-33, and not as the owner of the Servient Tenement (at [32(a)] and [32(e)]).

(b) Secondly, there was no need for the courts in the First and Second Actions to determine the Extension Issue (at [41]). The courts in both actions had effectively ruled that Collin, and later Lee Tat, were not competent to raise the Extension Issue (at [45]). It was not the owner of the Servient Tenement and therefore had no *locus standi* to raise the Extension issue. Thus, the decisions of the courts in the Second Action did not constitute a ruling on the merits of the Extension Issue (at [32(f)] and [32(g)]).

(c) Thirdly, any decisions made in the First and Second Actions could not have affected Lee Tat's rights as servient owner after it acquired the Servient Tenement in 1997. Further, the Extension Issue had not been decided in the First and Second Actions. Thus, in the Fourth Action, Lee Tat was not estopped from litigating any issue affecting its interests in the Right of Way in its capacity as owner of the Servient Tenement, including the Extension Issue (at [43(f)] and [82]–[84]).

(d) Fourthly, the judgment of the majority in *Grange Heights (No 4) (CA)* contained an "egregious error" in so far as it stated that the Extension Issue had been decided in the MCST's favour in the Second Action. This had caused the grave injustice of preventing Lee Tat from raising the Extension Issue in the Fourth Action. The *Arnold* exception (see the House of Lords decision in *Arnold v National Westminster Bank*

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plc [1991] 2 AC 93) therefore applied to the finding in *Grange Heights (No 4) (CA)* that the Extension Issue was *res judicata* (at [80]–[81]).

32 The Court of Appeal then considered both the Amalgamation Issue and the Extension Issue afresh. In so far as the Extension Issue was concerned, the court held that the MCST could not seek to extend the benefit of the Right of Way to Lot 561, which was a non-dominant tenement, as that would exceed the terms of the grant and therefore breach the *Harris v Flower* principle (*Grange Heights (No 3) (CA)* at [91]–[92]). In so far as the Amalgamation Issue was concerned, the court held that the Right of Way *vis-à-vis* Lot 111-34 had been extinguished by operation of law as a result of the amalgamation of Lots 111-34 and 561 (*Grange Heights (No 3) (CA)* at [93]).

The Fifth Action

33 In June 2009, the MCST filed an application for an order to reconstitute the Court of Appeal to set aside its judgment in *Grange Heights (No 3) (CA)*. It argued that there had been a breach of natural justice as the MCST had not been heard on the *Arnold* exception in the Third Action. It then filed an application to the High Court ("the Fifth Action") to determine the preliminary question of whether the Court of Appeal could be reconstituted to hear an application to set aside its own judgment. The application was heard by Choo Han Teck J, who in *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2010] 1 SLR 645, held that the Court of Appeal should not be reconstituted, because even if the MCST had been deprived of an opportunity to be heard on the *Arnold* exception, this was not so grave a procedural wrong as to warrant reopening the case (at [11]). Choo J therefore dismissed the application. This decision was upheld by the Court of Appeal in *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011]

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1 SLR 998 ("*Grange Heights (No 5) (CA)*"), albeit based on different reasoning. For present purposes, it is unnecessary to explain the details of this court's findings in *Grange Heights (No 5) (CA)*. It should be noted, however, that one of the court's reasons for affirming Choo J's decision to dismiss the application by the MCST was that it would not serve any useful purpose to allow the application. The Court held that in so far as the application had been brought as a precursor to an attempt to set aside the judgment in *Grange Heights (No 3) (CA)*, it would not serve any useful purpose because the Court in *Grange Heights (No 3) (CA)* had set aside the judgment in *Grange Heights (No 4) (CA)* not only based on the *Arnold* exception but on "three separate and distinct grounds" (*Grange Heights (No 5) (CA)* at [66]), including a finding that the Extension Issue had never been decided on the merits.

34 As will become clear later in this judgment, Lee Tat relies heavily on that finding to convince this court that the Judge had erred in dismissing its claim in trespass in the present set of proceedings.

The present set of proceedings

35 Lee Tat commenced the present set of proceedings on 24 December 2012. It claimed damages against the MCST in four causes of action: abuse of process, malicious prosecution, malicious falsehood and trespass. What follows is a brief summary of its case in the court below.

36 First, Lee Tat argued that the MCST had abused the court's process by participating in the Second, Third, Fourth and Fifth Actions for the collateral purpose of enhancing the value of its land by retaining the Grange Heights address and name. This it sought to do by retaining access (*ie*, the Right of Way) to Grange Road through the Servient Tenement.

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37 Second, Lee Tat argued that the MCST had maliciously prosecuted the Third and Fifth Actions because the MCST did not genuinely believe that Grange Heights residents were entitled to use the Right of Way. Malice was made out in that the MCST had done this for the collateral purpose of retaining the Grange Heights address.

38 Third, Lee Tat asserted that the following two statements constituted malicious falsehoods by the MCST:

(a) On 12 October 1997, the Straits Times ran an article titled "Condo's MC takes developer to court again". Mr Rustom M Ghadiali, the then Chairman of the MCST, was quoted as saying that "the estate's owners had the right to use the road forever – for walking as well as for driving", and that "the residents could not give up the right to access because it was a valuable piece of land" ("the 1997 Statement").

(b) On 14 November 2007, the MCST's property agents, Jones Lang LaSalle, placed an advertisement in the Straits Times regarding the sale of Grange Heights by tender. The advertisement stated that there was "[c]onvenient access from Grange Road" ("the 2007 Statement").

These will be collectively referred to as "the Statements".

39 Finally, Lee Tat's claim in trespass was based on its complaint that Grange Heights residents had used the Servient Tenement to access Lot 561 continually until 1 December 2008 when, as *Grange Heights (No 3) (CA)* had established, they were not entitled to do so.

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The decision below

Abuse of process

40 The Judge noted that it was unclear whether abuse of process was a recognised tort in Singapore and, if so, whether it was a cause of action capable of giving rise to a claim for damages. However, he found it unnecessary to decide these issues. In his view, even if this tort were recognised, the facts of this case would not even "fall within the scope of the English tort of abuse of process" (see the Judgment at [28]–[29]). The Judge reasoned that the wrong within the tort of abuse of process lay in a litigant bringing legal proceedings in order to seek some object which was *wholly extraneous* to the reliefs that might be ordered in those proceedings, and to achieve an outcome which was not reasonably related to victory in the suit (see the Judgment at [32]–[34]). The tort was therefore not made out on the facts. Even if the MCST's primary purpose in the various proceedings was, as Lee Tat claimed, to retain Grange Heights' name and address, that outcome was contingent on and related to the existence of the MCST's purported Right of Way over the Servient Tenement, which was precisely the subject matter of the Second to Fifth Actions. Thus, the MCST could not be said to have abused the process of the court for an "improper or collateral purpose" (see the Judgment at [35]). The Judge also found that the MCST was genuinely interested in securing physical access to the Servient Tenement for the subsidiary proprietors of Grange Heights (see the Judgment at [38]).

Malicious prosecution

41 The Judge noted that the tort of malicious prosecution had been extended to civil proceedings generally in England following the decisions in *Crawford Adjusters* and *Willers*, but that there was uncertainty over the position in

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Singapore (see the Judgment at [40]–[41]). He declined to make a finding as to whether the tort should be extended to civil proceedings generally here because, in his view, the claim was clearly not made out on the facts (at [42]). To succeed, Lee Tat would have to show that (a) it was prosecuted by the MCST; (b) the prosecution was determined in its favour; (c) the prosecution was without reasonable and probable cause; and (d) the prosecution was malicious (see the Judgment at [43], citing the decision of this court in *Zainal bin Kuning and others v Chan Sin Mian Michael and another* [1996] 2 SLR(R) 858 ("*Zainal bin Kuning*") at [54]). The Judge found that two elements of the tort – that the prosecution must have been without reasonable and probable cause, and that the prosecution must have been malicious – were not satisfied.

42 First, the MCST could not be said to have brought the previous actions "without reasonable and probable cause". It was not "so obvious" that Grange Heights residents were not entitled to use the Right of Way that the MCST "could not have truly believed otherwise" (see the Judgment at [55]). In particular, it was not obvious from the judgments in the Second Action that the Extension Issue had been left undecided, such that the MCST could be said to have been acting without reasonable and probable cause in the Fourth Action (see the Judgment at [57] and [68]). It also could not be said that the MCST lacked reasonable and probable cause just because various individuals had expressed concerns at annual general meetings and management council meetings about whether Grange Heights residents were in fact entitled to the Right of Way. The mere fact that the MCST might have had doubts about its case did not amount to a lack of reasonable and probable cause (see the Judgment at [71]–[72]).

43 The Judge further held that malice was not made out. Malice meant "being motivated by improper and indirect considerations" and required proof

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that "the prosecution was motivated not by a desire to achieve justice, but for some other reason" (see the Judgment at [84], citing *Zainal bin Kuning* at [84]). In the Judge's view, the MCST had brought the Second to Fifth Actions for a *bona fide* purpose, because it "genuinely sought to have its alleged right of way over the Servient Tenement adjudicated" (see the Judgment at [90]). Even if, as Lee Tat suggested, the MCST's primary motivation was to retain Grange Heights' name and address, that did not constitute an improper motive. There "was nothing spiteful or vindictive about" the MCST's commencement of the Second, Third and Fifth Actions [emphasis in original omitted] (see the Judgment at [87]).

Malicious falsehood

44 The Judge accepted that the 1997 Statement and the 2007 Statement both amounted to assertions that Grange Heights residents enjoyed the benefit of the Right of Way (see the Judgment at [95]). However, he did not agree that the Statements amounted to malicious falsehoods. To begin with, he held that they were not false, because both were made at times when the MCST had obtained judgments which suggested that Grange Heights residents were entitled to the Right of Way. The 1997 Statement was made after the decision of the Court of Appeal in the Second Action, while the 2007 Statement was made after the decisions in the Second, Fourth and Third Actions. These decisions were in favour of the MCST (see the Judgment at [100]–[107]).

45 The Judge further held that the element of malice was not made out. Malice could be made out only where the words were published with the dominant intention of injuring the plaintiff (see the Judgment at [109], citing the High Court decision of *Golden Season Pte Ltd and others v Kairos Singapore Holdings Pte Ltd and another* [2015] 2 SLR 751 ("*Golden Season*") at [92]), or

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where the defendant knew that the statement complained of was false, or did not believe it was true, or had a "reckless disregard of the true facts" (see the Judgment at [109], citing the decision of this court in *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639 at [82] and the High Court decision in *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd and others* [2008] 4 SLR(R) 727 ("*WBG Network*") at [72]). On the facts, there was nothing to suggest that the Statements had been made with the knowledge that they were false, or with reckless disregard to the truth, or with the predominant intention of injuring Lee Tat. Indeed, "the weight of judicial authority" at the time of the Statements was "firmly in favour of the MCST enjoying a right of way over the Servient Tenement" (see the Judgment at [110]).

Trespass

46 The Judge dismissed the claim in trespass on the basis of the doctrine of *res judicata*, which required that "even erroneous decisions" be given effect to (see the Judgment at [121], citing the decision of this court in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporation Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT International*") at [71]). The only exception to the doctrine of *res judicata* was the *Arnold* exception, which allowed the re-opening of a decision only to "affect *future* relief" [emphasis in original] (see the Judgment at [125]). In the Judge's view, Lee Tat's claim in trespass was not aimed at affecting future relief. Rather, it essentially "sought to undo the effect of *Grange Heights (No 4) (CA)*", and this was impermissible (see the Judgment at [131]).

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Issues arising on appeal

47 On appeal, Lee Tat argues that the Judge was wrong to have dismissed all of its claims, and maintains that its claims in abuse of process, malicious prosecution, trespass and malicious falsehood should be allowed. It ultimately seeks to be compensated for the opportunity cost of not being able to develop Lot 111-31 from 1997 to 2008, and Lots 111-32 and 111-33 from 1974 to 2008. Unsurprisingly, the MCST's position is that the Judge was correct to have dismissed Lee Tat's claims.

48 In view of the above, the issues arising for consideration are as follows:

(a) with regard to Lee Tat's claim for malicious prosecution, whether this tort should be extended to civil proceedings in Singapore, and if so, whether the tort is made out on the facts;

(b) with regard to Lee Tat's claim for abuse of process, whether this tort should be recognised in Singapore, and if so, whether the tort is made out on the facts;

(c) whether the tort of malicious falsehood is made out; and

(d) whether Lee Tat is able to claim for trespass notwithstanding the fact that at the material time, the relevant judicial pronouncements were in favour of Grange Heights residents being entitled to the Right of Way.

***Crawford Adjusters* and *Willers* – a summary of the facts**

49 Before we address these issues, we find it appropriate to set out a summary of the facts in *Crawford Adjusters* and *Willers*. This is not only

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because we will be referring to the reasoning in these cases extensively, but also because the facts will, we think, impart a useful sense of the types of circumstance arising from toxic and irresponsible conduct of litigation, in respect of which even courts of the highest authority may be sharply divided over whether to give effect to the impulse to remedy the obvious injustice that the victim has suffered. This will appropriately foreshadow our attempt below to analyse whether giving effect to that impulse can in fact be justified as a matter of principle and policy, as well as our observations on why such an analysis is of the first importance. It will also be appreciated that the facts of the present case are, in any event, of a very different ilk from these cases, and this at least instinctively suggests that the redress sought here is far less (or even not) deserved, although for the reason just given, that in itself is not conclusive.

Crawford Adjusters

50 In *Crawford Adjusters*, the plaintiff, Mr Alastair Paterson ("Mr Paterson"), acted as project manager and loss adjuster for the defendant insurer, Sagicor General Insurance (Cayman) Ltd ("Sagicor"), in relation to an insurance claim brought by a large residential development for damage sustained by the development during a hurricane. Mr Paterson was responsible for supervising and approving payments made to a firm of building contractors which had been engaged to carry out the restoration works. The contractors were responsible for procuring and paying for the subcontractors and the materials. To that end, they received a series of advance payments from Mr Paterson. After making advance payments totalling 2.9m worth of Cayman Islands Dollars ("KYD"), Mr Paterson advised Sagicor to settle the claim at KYD5.5m.

51 Around this time, a Mr Frank Delessio ("Mr Delessio") was appointed senior vice-president of Sagicor. Mr Delessio strongly disliked Mr Paterson and

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had a low opinion of his professional competence. Mr Delessio reviewed Mr Paterson's recommendation that Sagicor settle the claim for KYD5.5m and found that it was insufficiently documented. He came to the view that Mr Paterson and the contractors had dishonestly overstated the value of the works. At about that time, Mr Delessio stated that he intended to drive Mr Paterson out of business and to destroy him professionally. He appointed another chartered surveyor and loss adjuster, Mr Purbrick, to assess the value of the restoration works. Mr Purbrick produced reports which suggested that the value of the works was significantly less than Mr Paterson had suggested. Sagicor's lawyers advised, based on these reports, that the degree of overcharging by Mr Paterson was so gross as to be *prima facie* evidence of fraud. Sagicor then commenced proceedings against Mr Paterson and the contractors, claiming damages for breach of contract, deceit, conspiracy to defraud and negligence. Mr Delessio deliberately alerted the local press to these allegations against Mr Paterson and the contractor. As a result of this, Mr Paterson suffered loss to his reputation and business.

52 Just three months prior to the dates fixed for trial, the contractors disclosed invoices and other documentation which indicated that they had indeed made extensive payments to subcontractors and suppliers. Concerned that this information appeared to undermine Mr Purbrick's reports, which had been the basis of Sagicor's claim, Sagicor discontinued the action against Mr Paterson and the contractors. Mr Paterson, in turn, served an amended counterclaim against Sagicor, claiming damages for abuse of process. The matter was set down for trial but before the trial commenced, Mr Delessio committed suicide.

53 The trial judge noted that the torts of abuse of process and malicious prosecution were closely related and treated Mr Paterson as having relied on

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both torts in the alternative (even though Mr Paterson's counterclaim was only for abuse of process). He held that the tort of abuse of process was not made out because Mr Delessio (whom he found to be the directing mind and will of Sagicor) unreasonably, but genuinely, believed that Mr Paterson had overstated the value of the restoration works. With regard to malicious prosecution, the trial judge held that Sagicor's proceedings had been commenced without reasonable cause and were brought against Mr Paterson maliciously. Nevertheless, he disallowed Mr Paterson's counterclaim on the basis that the tort of malicious prosecution did not extend to civil proceedings generally. The Court of Appeal of the Cayman Islands affirmed these findings on appeal.

54 Mr Paterson appealed to the Judicial Committee of the Privy Council. With regard to the tort of abuse of process, the Judges were unanimous in holding that the claim was not made out because Mr Delessio genuinely believed that Sagicor had been overcharged by Mr Paterson and the contractors, and there was no suggestion that Sagicor had no true intention of bringing the proceedings to trial. With regard to the tort of malicious prosecution, the appeal was allowed by a three-to-two majority, Lord Kerr of Tonaghmore, Lord Wilson and Baroness Hale of Richmond finding that the tort should be recognised in the context of civil proceedings generally, and that its elements were established. The details of their reasoning will be explored later in this judgment.

Willers

55 Next, in *Willers*, the plaintiff, Mr Peter Willers ("Mr Willers"), was employed by Mr Albert Gubay ("Mr Gubay"), a successful businessman, as his right hand man for over 20 years until he was dismissed in 2009. One of Mr Gubay's businesses was a leisure company, Langstone Leisure Ltd

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("Langstone"). Mr Willers was a director of Langstone. Prior to Mr Willers's dismissal, Langstone pursued an action for wrongful trading against the directors of another company, Aqua Design and Play Ltd ("Aqua"), which had gone into liquidation. On Mr Gubay's instructions, Langstone's action against Aqua's directors was abandoned shortly before trial.

56 In 2010, Langstone sued Mr Willers for breach of contractual and fiduciary duties in causing it to incur costs in the action against the directors of Aqua. Mr Willers issued a third party claim for an indemnity against Mr Gubay on the grounds that he had acted under Mr Gubay's instructions in pursuing the claim against Aqua's directors. On 28 March 2013, two weeks before trial, Langstone discontinued the action against Mr Willers.

57 Mr Willers brought proceedings against Mr Gubay, claiming damages for malicious prosecution of the claim brought against him by Langstone. Mr Gubay sought an order striking out the claim on the sole ground that malicious prosecution did not extend to civil proceedings generally. The judge agreed and struck out the action. Mr Willers appealed. While the appeal was pending, however, Mr Gubay died. His executors were substituted as defendants to the action and respondents to the appeal. The matter came before the UK Supreme Court. By a five-to-four majority, the court allowed the appeal, holding that the tort of malicious prosecution did extend to civil proceedings generally. Mr Willers's claim thus proceeded to trial and, as we have noted earlier, the dispute is winding its way through the English courts (see [5] above). Again, we will explore the judges' reasoning in greater detail below.

58 Having set out this overview of the two cases which recognised, by a bare majority, the extension of the tort of malicious prosecution to civil proceedings generally under English law, we turn to the question of whether we

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should likewise recognise such an extension of that tort in the Singapore context.

Our decision

Issue 1: Malicious prosecution

59 It is undoubtedly the case that a civil cause of action for the malicious prosecution of *criminal* proceedings exists in this jurisdiction. Indeed, this is expressly recognised in s 359(5) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"), which provides that the court's power to order that an accused be compensated by the prosecution or the complainant for a frivolous and vexatious prosecution "shall not affect any right to a claim for civil damages for malicious prosecution". There are strongly principled reasons why such a claim is recognised. Cases involving such egregious situations are (fortunately) few and far between, as the number of reported and unreported cases demonstrate. Indeed, the principal justification is to deter (as well as compensate for damage caused by) the *abuse of state power*. The issue, however, is whether the tort of malicious prosecution ought to be extended to proceedings which are strictly within the *civil sphere*, which are quite different from criminal proceedings.

60 We shall begin with some general observations on the nature of the reasoning that should be employed in resolving this issue. We are compelled to do so because in the majority judgments in both *Crawford Adjusters* and *Willers*, there is a noticeable emphasis on the broad notion that every wrong deserves a remedy, and on the influence of previous cases on the existence and on the development of the tort as it stands today. The latter is, of course, a characteristic feature of common law reasoning, but it has proper limits which need from time to time to be articulated. And for reasons that we shall explain,

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it is our view that the issue at hand ought to be resolved primarily by considering the relevant *specific* arguments of principle and policy, in contrast to pure deference to the decided cases.

General observations

Every wrong deserves a remedy

61 A significant theme of the majority judgments in *Crawford Adjusters* is the proposition that wrongs should be remedied. This proposition was referred to by Lord Wilson in his leading judgment as the "reason" for the law's existence which "the arguments against renewed recognition of a tort of malicious prosecution of civil proceedings fail to override" (*Crawford Adjusters* at [73]). Lord Kerr perceived the issue in that case in even broader terms, taking the view that "fundamental principle has a large part to play in the resolution of the debate in this case", and that "the pre-eminent principle at stake here is that for every injustice there should be remedy at law" (*Crawford Adjusters* at [94]). With respect, while such propositions may be attractive at first blush, deeper consideration reveals that they are not a suitable guide for a proper resolution of the issue whether to recognise a new tort.

62 The fundamental difficulty with the proposition that every wrong deserves a remedy is that it presupposes that the damage that has been suffered constitutes a legal wrong that deserves a legal remedy. To put the matter in the converse, it presupposes that the person who has suffered the damage has a legal right to the remedy he seeks. But whether or not there is a "legal wrong" or a "legal right" in this sense is precisely the issue in question. And in order for the court to answer that question, it must decide whether there are good arguments from authority, principle and policy for recognising the legal wrong or the legal right. This means that the assertion that when a wrong has been committed, there

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ought in principle to be a remedy, is no more than a mere assertion. One may easily elicit agreement with it, but one would equally be none the wiser thereafter as to the underpinnings of that proposition with respect to the specific legal right or legal wrong in question. In this connection, we agree with the following observations of Baroness Hale in *Crawford Adjusters*, who, significantly, was also in the majority along with Lords Wilson and Kerr (at [81]):

> It is always tempting to pray in aid what Sir Thomas Bingham MR referred to as "the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied": *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 663. ***But by itself that wise dictum does not tell us what the law should define as a wrong.*** *Some conduct is wrongful whether or not it causes any damage – that is the essence of the tort or torts of trespass; other conduct is only wrongful if it causes particular types of damage – that was the essence of the action on the case;* ***but not all conduct which causes such damage is wrongful****.* The tort or torts of wrongfully bringing legal proceedings are actions on the case and therefore can only lie if there is damage of the kinds specified in *Savile v Roberts* (1698) 1 Ld Raym 374. But that is not enough. Instigating legal proceedings in good faith and with reasonable cause, even if they fail and even if they do damage in the *Savile v Roberts* sense, is not wrongful. Even maliciously instigating legal proceedings is not always, or even often, wrongful. So how is the wrong done by instituting legal proceedings to be defined? [emphasis added in italics and bold italics]

63 The dangers of providing a remedy without proper justification are well known, the chief of which is that the courts may create "bad law", that is, the court may cause the law to develop in a way that adversely complicates other areas of law and creates new injustices. As Lord Mance observed in his dissenting judgment in *Willers* (at [93]):

> … Viewed in isolation, the assumed facts of this case make it attractive to think that the appellant should have a legal remedy. But the *wider implications require close consideration.*

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> We must beware of the risk that hard cases make bad law… [emphasis added]

In a similar vein, Lord Reed opined in *Willers* that "major steps in the development of the common law should not be taken without *careful consideration of the implications*, however much sympathy one may feel for the particular claimant" [emphasis added] (at [184]).

64 The upshot is that we must eschew broad statements of principle in so far as they purport to be *specific justifications* for a tort of malicious prosecution in civil proceedings generally. We do not deny that considerations of justice and fairness are crucial to the inquiry. However, the tort that the court is being asked to recognise must be undergirded by specific and coherent arguments of legal principle or policy (see *Willers* at [178] *per* Lord Sumption).

Influence of case law

65 Another significant theme of many of the judgments in *Crawford Adjusters* and *Willers* is a reliance on case law as pointing towards either the existence of a general tort of malicious prosecution of civil proceedings or the non-existence of such a tort. While we do not think that any of those judgments can be fairly criticised for relying on precedent as the decisive reason for their conclusions, we consider it appropriate to observe here that where a new legal cause of action is sought to be recognised for the first time, precedent tends to serve a limited role. This observation encompasses several strands of thought.

66 First, where there is a serious and genuine argument that the cause of action in question is new, the general body of cases behind that cause of action is likely to be equivocal in effect. As a result, placing too much reliance on those cases is unlikely to be productive. Nor will much come from making absolute

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statements about their effect. For example, Baroness Hale in *Crawford Adjusters* was prepared to say in relation to the tort of malicious civil prosecution that the view that "such a wrong has been recognised by the law for centuries is incontrovertible" (at [83]). However, it is plain from the analysis of the cases undertaken by Lord Sumption in that case, and by Lord Mance in *Willers*, that that view is in fact quite controvertible. That explains the more measured observation made by Lord Clarke of Stone-cum-Ebony in *Willers* that "the early case law is capable of more than one respectable interpretation, and it may be that there was never a time when there was a general understanding precisely where the boundaries of the tort lay" (at [16]).

67 Second, the number of cases that go one way or another is at best a *quantitative* measure. What is more important are the *qualitative* aspects of the relevant cases – in particular, whether they embody sound logic and principle. Indeed, in so far as this court is concerned, it is, *a fortiori*, not bound by any *foreign* decision. What matters, in the final analysis, is whether or not there are sound legal arguments, based on first principles, that justify the extension of the tort of malicious prosecution to civil proceedings generally.

68 While case law is the lifeblood of the common law system, it is not important for its own sake (see the decision of this court in *Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others and another matter* [2016] 2 SLR 1022 at [1]), and it is certainly not sacrosanct – except to the extent that it is binding pursuant to the doctrine of *stare decisis* (which is itself also subject to exceptions in any event). Indeed, even the majority in *Crawford Adjusters* admitted that the early case law it referred to was departed from in the English Court of Appeal decision in *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 ("*Quartz Hill*"), although they were of the view that *Quartz Hill* marked a wrong turn in the legal road. However, this, in and of itself,

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demonstrates that the case law did not unambiguously point in one direction. It should also be pointed out that in *Quartz Hill* itself, Bowen LJ was of the view that there was "no decisive authority" (at 691) for the broad proposition that an action could be maintained in civil proceedings generally pursuant to the tort of malicious prosecution.

69 None of this is to say that historical analysis of the relevant case law is not profitable. The common law as it stands is very much what the judges of the past have made of it, and any development or divergence ought to be pursued with a firm understanding of how the law came to be. That being said, the direction of that pursuit is very much up to the judges of today, and the only rational way in which the proper direction might be decided is by reference to *specific arguments of principle and policy*. With this in mind, we turn now to explain the ways in which the existing cases *shape* (without *determining*) our consideration of the question whether the tort of malicious prosecution ought to be extended to civil proceedings.

Lessons from history

70 The historical development of the tort of malicious prosecution was the subject of detailed analysis and conflicting interpretations in both *Willers* and *Crawford Adjusters*. As mentioned at [8] above, the judges in the majority in each case considered that, on the authorities, the tort of malicious prosecution *had* historically been recognised in the civil sphere on a general basis, while the minority took the contrary view. We do not see the profit of repeating that analytical exercise in full measure here because ultimately, as Lord Reed correctly said in *Willers*, the court must not lose sight of the fact that that it is deciding the law for the 21st century (at [182]). We will, however, state that we prefer the analyses of the case law that was developed in the leading minority

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judgments in *Crawford Adjusters* and *Willers*, namely, those of Lord Sumption and Lord Mance, respectively. In particular, Lord Sumption's analysis of the cases established that the tort of malicious prosecution had been formulated *only* with regard to the criminal sphere (see *Crawford Adjusters* at [136]–[144], as well as Christian Witting, *Street on Torts* (Oxford University Press, 14th Ed, 2015) ("*Street*") at p 608). We consider that these historical perspectives do shape the issue at hand in two significant ways. First, they demonstrate that the tort's true rationale is to afford a private remedy for the abuse of state power. Second, the cases demonstrate that the tort has been extended to civil proceedings only in so far as they concerned applications (usually for *ex parte* interlocutory remedies) which have the potential to cause immediate and irreversible damage to the person, property or reputation of the respondent. There is therefore no doubt that an extension of the tort to civil proceedings generally would overreach its historical provenance, and must be justified by cogent reasons of principle and policy.

Rationale of the tort

71 We agree with Lord Sumption that historically speaking, "the rationale of the tort … lie[s] in the public character of the function performed by the prosecutor" (*Crawford Adjusters* at [139]). The tort arose because until the 1830s in England, almost all prosecutions were carried out by private individuals. The private prosecutor did, however, bring his indictment in the name of the Crown, and therefore performed "an essentially public function" (*Crawford Adjusters* at [136]). That is why malice is a component of liability, because it "negative[s] the public character of the prosecutor's performance of his functions, and expose[s] him to liability which would not have attached to proper albeit misguided performance of a public function" (*Crawford Adjusters* at [142]). The tort was recognised in, and confined to, the criminal sphere in

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order to ensure that private prosecutions were not abused, since they involved the invocation of coercive state power.

72 Although responsibility for the conduct of criminal prosecutions has been largely transferred to a public prosecutor – this being true both in England and in Singapore – the risk of abuse remains real. That much is recognised by Parliament in s 359(5) of the CPC, as we have seen (at [59] above). One of the ways of mitigating that risk is the availability of the tort of malicious prosecution. As one writer has put it (see Chuks Okpaluba, "'Prosecution' in an action for malicious prosecution: a discussion of recent commonwealth case law" [2013] J S Afr L 236 at p 236):

> … Through the action for malicious prosecution *the state is held accountable for the acts of prosecutors who do not enjoy absolute immunity* for violating the liberty of the person and the human dignity arising from botched prosecution. … [emphasis added]

73 The historical rationale for the tort invites the question whether the differences between the criminal process and the civil process suggest anything about whether recognising a general tort of malicious prosecution of civil proceedings would be a *principled* step for the law to take. This is a question we examine in detail at [86]–[92] below. But before considering that particular issue, it is important to recognise that there are cases in which the tort has in fact been successfully established in civil proceedings, and therefore the issue that must first be addressed is the true import of those cases.

A rational list of ex parte *processes*

74 In our judgment, the cases just mentioned do *not* support the existence of a *general* tort of malicious prosecution in civil proceedings. The question of what to make of them is succinctly captured in Baroness Hale's suggestion in *Crawford Adjusters* at [86] that they are either a "rag bag" or a "rational list of

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ex parte processes which do damage before they can be challenged". Lord Sumption (at [143]) and Lord Neuberger (at [178]) preferred the latter view (as did a number of other judges in earlier cases as well as in *Willers*). As we shall explain in the following paragraphs, we are inclined to agree.

75 The cases in question have arisen in the following situations which were summarised by Lord Wilson in *Crawford Adjusters* (at [67]): (a) a petition for bankruptcy (see, *eg*, the Court of Exchequer's decision in *Johnson v Emerson and Sparrow* (1871) 6 LR Ex 329); (b) a petition for winding up (see, *eg*, *Quartz Hill* as well as the Scottish decision of *The "Seaspray" Steamship Company Limited v Tenant* 1908 SLT 874); (c) a writ to arrest and detain a judgment debtor who had already paid the debt (see, *eg*, the Court of Common Pleas decision of *Gilding v Eyre and another* (1861) 10 CBNS 592 ("*Gilding*")); (d) the procurement of a bench warrant to arrest and produce a person for failure to respond to a witness summons which had not been served on him (see, *eg*, the House of Lords decision of *Roy v Prior* [1971] AC 470); (e) a writ to arrest a ship in the course of a dispute about a contract for its sale (see, *eg*, the decision of the Probate, Divorce and Admiralty division of the English High Court in *The Walter D Wallet* [1893] P 202); (f) a writ to arrest an aircraft in the course of a dispute about an alleged lease of it (see, *eg*, the New Zealand High Court decision of *Transpac Express Ltd v Malaysian Airlines* [2005] 3 NZLR 709; (g) an order for the attachment of a plaintiff's assets in advance of an arbitration (see, *eg*, the English High Court decision of *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2009] 1 All ER (Comm) 479; and (h) a search warrant (see, *eg*, the Privy Council's decision (on appeal from the Court of Appeal of the Cayman Islands) in *Brian Gibbs and others v John Mitchell Rea* [1998] 1 AC 786).

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76 The basic feature of these cases appears not to be controversial. Thus, in the House of Lords decision of *Gregory v Portsmouth City Council* [2000] 1 AC 419 ("*Gregory*"), Lord Steyn observed their common feature to be "the initial ex parte abuse of legal process with arguably immediate and perhaps irreversible damage to the reputation of the victim" (at 427). In *Crawford Adjusters*, Lord Sumption described those cases as "involv[ing] ex parte interlocutory orders improperly procured by the person initiating the proceedings, in circumstances where in the nature of things there would never be a final order" (at [143]). In the same case, Lord Neuberger added that because the processes involved were *ex parte* or interlocutory, "they could quite conceivably have been granted in proceedings which could subsequently be established as having been 'malicious'" (at [178]). And in *Willers*, Lord Mance accepted that "[t]here is a range of cases in which the ex parte misuse of civil procedures, with immediate effects on the other party's person, property or business, has grounded a tortious claim for malicious prosecution" (at [129]).

77 In summary, most of these cases (subject to exceptions which we will touch upon in a moment) involved the improper procuring in the first instance of *ex parte* interlocutory orders by the party initiating the proceedings, the effect of which is (potentially at least) to inflict immediate and perhaps even irreversible damage to the reputation of the other party.

78 As for the cases which have recognised the tort of malicious prosecution in respect of bankruptcy and winding up proceedings, although these cases have not involved the improper procurement of *ex parte* interlocutory *orders*, they are in a similar category in so far as the legal requirement of advertisement placed the petitioners in a position to inflict irreversible damage on the other party by unilaterally and publicly impugning his credit and reputation before the petition was heard on the merits. Thus, in *Quartz Hill*, Brett MR noted that

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under regulations made pursuant to the Companies Act 1862 (c 89) (UK), a winding up petitioner was required to advertise the petition seven days before it was to be heard (at 685) (this is also the position in Singapore – see r 24 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed)). Such advertisement meant that there was potential for damage to the credit (and consequent business reputation) of the company, in advance of actual hearings where the allegations as well as imputations of insolvency could be defended (*Quartz Hill* at 685 and at 692–693 *per* Bowen LJ; and see generally Andrew Keay, "Claims for malicious presentation: the peril lurking on the sidelines for petitioning creditors" (2001) 4 Insolvency Lawyer 136). Brett MR considered that the position was similar in respect of bankruptcy proceedings under the Bankruptcy Act 1869 (c 62) (UK), where "a man's fair fame is injured … because he is openly charged with insolvency before he can defend himself" (*Quartz Hill* at 684 and at 691−692 *per* Bowen LJ).

79 We note that in *Crawford Adjusters*, Baroness Hale appeared to accept the view that the cases could be viewed as a "rational list of ex parte processes which do damage before they can be challenged". However, her Ladyship *then* used this proposition to build the claim that a general tort of malicious prosecution of civil proceedings existed, reasoning that "today bringing an ordinary action can also do damage before it can be challenged" (at [86]). We respectfully disagree that the cases justify this view. Whilst it is true that "ordinary actions" may also cause damage before they are challenged, the law (rightly, in our view) continues to recognise *ex parte* interlocutory processes as a special type of proceedings which are especially capable of causing damage and which carry a particularly high risk of abuse. That is clear from the fact that a special practice has developed in relation to many types of *ex parte* and interlocutory orders, in that they are typically accompanied by cross-

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undertakings as to damages which may be called on if the order is found to have been wrongly obtained. This serves only to *underscore* the fact that these cases constitute a distinctive class of civil remedies, which explains the *unique* treatment which they have received in relation to claims for malicious prosecution. The fact that malice is irrelevant to the defendant's entitlement to damages in these cases only raises the question as to why malice should be relevant with regard to civil proceedings more generally (see *Willers* at [160] *per* Lord Neuberger).

80 In our view, there is also sound reason why the courts have treated winding up proceedings as being in an exceptional class of proceedings which may result in tortious liability where maliciously commenced. The historical requirement highlighted in *Quartz Hill* that such applications be *advertised* is significant not only because the requirement of advertisement itself engenders a risk of reputational harm, but also because this requirement points to the *special, collective character* of such applications as going beyond the usual assertion of *personal rights* in ordinary civil proceedings. This was noted by Hoffmann J (as he then was) in the English High Court decision of *Re RA Foulds Limited* (1986) 2 BCC 99, 269 at 275:

> … It is frequently said that in presenting a petition the creditor is not merely exercising a *personal right* but a *class right on behalf of all creditors*. That is why the petition is advertised, so that other creditors may have the opportunity to come in and oppose or support the making of the winding-up order, and on the hearing of the petition any winding-up order that is made is deemed to be made on behalf of all creditors and contributories. … [emphasis added]

81 Whereas ordinary civil proceedings imply that the defendant is personally liable to the plaintiff, winding up proceedings, which invite all of the defendant's creditors to take a position in relation to the debts owed to them by the defendant company, imply that the defendant stands in a particular status in

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relation to all of these creditors, and not only in relation to the applicant. That would ordinarily have a tremendous effect on the defendant's credit and reputation. It follows that "civil actions cannot be said to have the same inevitable or necessary effect on trading or any other reputation as a winding up petition" (*Willers* at [123] *per* Lord Mance). Indeed, our courts have noted that the mere commencement of winding-up applications can carry drastic consequences (see, *eg*, the decision of this court in *Ting Shwu Ping (administrator of the estate of Chng Koon Seng, deceased) v Scanone Pte Ltd and another appeal* [2017] 1 SLR 95 at [54]). Such consequences may take the shape of damage not only to the company's reputation but also to its financial position, since such applications *imply* insolvency and are almost invariably considered to be "events of default" which trigger certain implications under most modern loan arrangements (see, *eg*, the decision of this court in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [84]).

82 The most significant alternative perspective on the cases that was used to justify the existence of the tort generally in the civil context was Lord Clarke's in *Willers*. His Lordship was not persuaded that the cases could be unified by a common thread, principally because there existed claims for damages for the wrongful arrest of a ship, and those claims were "not limited to claims for security" obtained on an *ex parte* basis (see *Willers* at [68]). And the availability of this type of claim, in his Lordship's view, in fact supported the existence of a general tort of malicious prosecution of civil proceedings.

83 We also respectfully disagree with this view. The arrest of ships (and other vessels, such as aircraft) may be treated as a jurisdiction which is *sui generis*, not least because the arrest of a vessel is recognised as a particularly "invasive remedy" which may have drastic economic consequences for ship owners (see the decision of this court in *The "Vasiliy Golovnin"* [2008]

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4 SLR(R) 994 at [51]; see also Toh Kian Sing, *Admiralty Law and Practice* (LexisNexis, 3rd Ed, 2017) at p 205). To that extent, while Lord Clarke's points are well taken, his Lordship's analysis does not impact in an adverse way the thesis that we have tentatively accepted to the effect that what appear like seemingly disparate situations could – with the possible exception of the arrest of vessels – be unified by a common thread as defined at [76] above.

84 For this reason, we consider that in so far as there is case law recognising the tort of malicious prosecution in relation to *specific* types of civil proceedings, these situations ought to continue as part of Singapore law. This is *a fortiori* the case in relation to the arrest of ships. We hasten to add that we would be very reluctant to extend or expand these situations or categories, absent extremely persuasive reasons. In this regard, we also bear in mind Lord Neuberger's observation in *Crawford Adjusters* (at [195]) that "[o]nce … the exceptions are logically explained, it is harder to justify departing from the rule or adding to the exceptions other than on a logical basis".

85 More broadly, we agree with Lord Neuberger in *Willers* that the boundaries of the tort, as applied to civil proceedings, have "always been heavily circumscribed and have (on any view) been treated by the courts as heavily circumscribed since 1883", and that this "places a tolerably heavy burden on the appellant's argument that those boundaries should, in effect, be removed, or at least substantially widened" (at [154]). For reasons that we shall now explain, principle and policy do *not* justify any such widening.

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Reasons of principle

Criminal versus civil proceedings

86 In our view, there are essential differences between criminal and civil prosecutions, both in terms of their *character* and their *consequence*, which justify maintaining the distinction as to whether they are capable of giving rise to claims in malicious prosecution. We therefore respectfully differ from the views of those who see the distinction as no barrier to extending the tort (see, *eg*, *Crawford Adjusters* at [39] *per* Lord Wilson, at [87] *per* Baroness Hale, and at [104] *per* Lord Kerr).

87 The *character* of a criminal prosecution, carried out with a view to punishing a public wrong, is fundamentally different from that of a civil prosecution which is carried out with a view to vindicating a private right. The difference between these two types of proceedings was explained in the following passage from an earlier decision of this court, *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [52]:

> … With the reign of William the Conqueror, the [English] criminal justice system, as it then stood, changed drastically. A distinction was created between liability for private wrongs and liability for public wrongs. Sir William Blackstone explained clearly the distinction between public wrongs and private wrongs in *Commentaries on the Laws of England* vol 4 (A Strahan, 15th Ed, 1809) as follows (at p5):
>
> > [P]rivate wrongs, or civil injuries, are an infringement or [a] privation of the civil rights which belong to individuals, con[s]idered merely as individuals: public wrongs, or crimes and [misdemeanours] are a breach and violation *of the public rights and duties, due to the whole community, con[s]idered as a community, in [its social] aggregate capacity.*
>
> As a result of the above change in the English criminal justice system, the individual victim was replaced by the State. The offence was considered to be committed against the State and the liability of the offender was, accordingly, owed first and

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> foremost to the State. *This is the criminal justice system which Singapore has inherited and maintains to this day. …*
>
> [emphasis added]

88 This difference in character carries with it several important consequences. First, criminal prosecution almost always has more serious effects than civil proceedings on the defendant's reputation. A message is conveyed to the public when a charge is laid that the person in question has been accused of committing a wrong against the community at large and often against an alleged victim that makes him worthy of punishment. By contrast, no stigma of this nature generally arises when a person is sued in civil proceedings. While we do not deny that a civil suit can sometimes result in serious reputational harm to the defendant, as Prof Gary Chan ("Prof Chan"), the *amicus curiae*, correctly points out, that usually happens when the substance of the action is capable of some kind of criminal (or quasi-criminal) characterisation as well, such as fraud.

89 Second, the legal consequences of a successful criminal prosecution are usually more invasive of a defendant's rights than civil proceedings. An accused person may have his property seized, liberty deprived, or life taken as a result of his conviction (see the decision of this court in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [60]). By no measure is this range of consequences equal in potential gravity to the consequences of losing a civil suit. This is partly why a charge must be proved beyond reasonable doubt before a conviction on it can be secured. Moreover, the gravity of those consequences is felt even before they are imposed for the accused will be having to bear the weight of anticipating the worst during the prosecution itself. Again, we are not suggesting that civil defendants are free from anxiety. But their situation, in our estimation, is meaningfully different from that of an accused in the dock awaiting a pronouncement on his alleged guilt.

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90 Third, criminal prosecution is principally carried out in this jurisdiction by public authorities. Under Art 35(8) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), "[t]he Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence". Right-thinking members of society are likely to attach, and indeed would be justified if they attached, credibility and weight to the fact that a criminal charge has been laid against an individual. This exacerbates the two effects of being subject to criminal prosecution that we have outlined above. In this respect, the contrast with civil proceedings could not be clearer given that they are, in the main, commenced by private individuals against each other.

91 In our judgment, the public character and harsh consequences of criminal proceedings undergird the law's recognition that those who suffer damage at the hands of prosecutors who abuse their function for malicious or improper motives are deserving of a remedy. The tort is also a "tool for constraining the arbitrary exercise of the powers of public prosecuting authorities" (*Crawford Adjusters* at [145] *per* Lord Sumption). Because prosecutors are office holders who exercise public functions and in so doing take on the mantle of the public and community at large, the power which they wield, and the need to guard against abuses of such power, justify the recognition of malicious prosecution in respect of criminal proceedings. For these reasons, we are unable to agree with the suggestion that "the distinction between bringing criminal proceedings in the public interest and bringing civil proceedings in one's own private interest [does not] make much sense today, if it ever did" (*Crawford Adjusters* at [87] *per* Baroness Hale).

92 We reiterate that we do not deny that unmeritorious and maliciously brought civil proceedings may *also* cause defendants damage. Indeed, a

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maliciously brought civil suit may cause a defendant not only the "'inconvenience and embarrassment', normally caused by litigation" (*Crawford Adjusters* at [176] *per* Lord Neuberger, citing the decision of the Supreme Court of Texas in *Texas Beef Cattle Co v Green* (1996) 921 SW 2d 203 at 208), but significant economic and reputational damage as well, as is clear from the facts of *Crawford Adjusters*. But we are not persuaded that the risk that such injury will go without remedy is sufficient to outweigh the many problems discussed below that will arise if the tort is extended to civil proceedings.

Malice in the law of tort

93 We also agree with Lord Sumption in *Crawford Adjusters* (at [133]−[135]) that extending the tort to malicious prosecution is inconsistent with the principle that malice is generally irrelevant in the context of tort law (see also *Willers* at [137] *per* Lord Mance). The principle, specifically, is that if an act is lawful, however ill the motive might be, a person has the right to do it (see the seminal House of Lords decision of *The Mayor, Aldermen and Burgesses of the borough of Bradford v Edward Pickles* [1895] 1 AC 587 at 594 *per* Lord Halsbury LC). Lord Sumption noted in *Crawford Adjusters* (at [133]) that the point was restated by Lord Watson in the House of Lords decision of *Thomas Francis Allen v William Cridge Flood and Walter Taylor* [1898] 1 AC 1 at 92 where the latter said that "[a]lthough the rule may be otherwise with regard to crimes, the law of England does not … take into account motive as constituting an element of civil wrong".

94 This general principle is, in our judgment, a salutary and well-established principle of the law of tort because it serves fundamentally to protect the freedom of the individual to perform lawful acts for any reason of his choosing. Thus, it is entirely lawful for a person to commence civil proceedings

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against another person. If those proceedings turn out to be unmeritorious then he will face the usual procedural as well as costs consequences. It is not clear why just because he commences those proceedings with malice or some other untoward motivation, he ought thereby to be civilly liable to the person against whom those proceedings have been commenced. Of course, the tort of malicious prosecution has other elements, but those elements are concerned essentially with proving the lack of foundation of what would otherwise have been a perfectly lawful act of commencing proceedings. Therefore, to the extent that malice is a defining element of the tort – and clearly it is – the tort is an anomalous one.

95 Lord Sumption in *Crawford Adjusters* identified two significant exceptions in the law of tort where malice is relevant. The first relates to the tort of conspiracy to injure but, as his Lordship correctly points out (at [134]), this particular tort "has generally been regarded as *sui generis*, and is usually justified by reference to the especially pernicious effect of combinations" [emphasis added]. Lord Sumption then proceeds to consider the second exception which, in his view, "comprises a limited category of causes of action in which *the essence* of the tort is *the abuse of a* ***public*** *function for some collateral purposes of the person performing it*" and that "[t]his may be (and generally is) *established by proof of targeted malice*" [emphasis added in italics and bold italics] – of which "[t]he paradigm case is the tort of misfeasance in public office" (at [134]). Lord Sumption then observes (at [135]) that "[i]t is to this latter category of malice-based torts that the action for malicious prosecution belongs". Indeed, *the concept of malice* enables the court to ***balance*** the need to ensure that the public good is achieved by bringing criminals to book on the one hand and the need to prevent abuse that results in the violation of

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individual liberty on the other (a point that we have already explored in some detail above).

96 It is clear that the second exception referred to in the preceding paragraph, being related as it is to the abuse of a ***public*** *function*, rests on a *very narrow* basis indeed (Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 19th Ed, 2014) ("*Winfield and Jolowicz*") refer to this (at para 20-21) as the "public law conception" of the tort of malicious prosecution). Put simply, under these *special and limited* circumstances, the courts are prepared to permit a claim under the tort of *malicious prosecution*. The corollary of this is that the tort of malicious prosecution ought *not* to be extended to cover situations in the civil sphere generally (*Winfield and Jolowicz* refer to this (at para 20-21) as the "private conception" of the tort of malicious prosecution). To proceed otherwise would be not only to wholly ignore the extremely limited role that malice plays in the law of tort but also to extend what is in essence an action intended to restrain abuse of a *public* function into the *private* sphere – and without let or hindrance, save to the extent that the plaintiff must establish, *inter alia*, a lack of reasonable and probable cause as well as malice. This brings us to the next (and closely related) point – which relates to the uncertainties surrounding the concept of malice.

97 On that point, as Lord Mance points out in *Willers* (at [138]–[139]), the facts of *Crawford Adjusters* demonstrate that malice may be established based on the (original) plaintiff's dominant motive to injure, notwithstanding the fact that he may believe the claim to be well founded and may intend to injure the defendant by pursuing it to judgment. The concept of malice, as developed in the case law, does *not* require that the original plaintiff actually appreciate that his claim was unfounded, so long as he objectively lacked reasonable and probable cause (*Willers* at [139]). However, such a conception, in his Lordship's

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view, "opens the door to wider claims, to wider exposure and to wider risks of misuse" (at [139]). Lord Mance also points out that the fact that malice must entail a dominant motive on the part of the (original) plaintiff to injure the (original) defendant "opens the door to future litigation about the meaning of dominant motive" (at [140]).

98 Hence, the concept of malice is itself rather fluid and malleable, and gives rise to uncertainty in the sphere of *application as well as further definition* (for example, as to what dominant motive means). Lord Neuberger agreed with Lord Mance's views, also noting that "there could be real problems involved both in identifying what constitutes malice and in deciding what types of loss and damage should be recoverable in connection with claims based on the proposed tort" (*Willers* at [170]). We also note that a leading textbook has observed that "'malice' has proved *a slippery word* in the law of torts" (see Carolyn Sappideen & Prue Vines eds, *Fleming's The Law of Torts* (Lawbook Co, 10th Ed, 2011) at para 27.80 [emphasis added]). Although Lord Toulson in *Willers* sought to argue (at [52]) that there is an established body of case law on the concept of malice, his Lordship did not, with respect, deal with the *specific* difficulties referred to in both this paragraph as well as the next.

99 We would, in fact, go further and observe that the very concept of malice itself tends towards a *subjective* inquiry, which would, in turn, exacerbate the problem of *uncertainty*. Whilst it is true that the court will, as far as is possible, have regard to the relevant objective evidence before it, any inquiry into the presence or absence of malice is inherently fraught with subjectivity. If, however, this is the case, the argument often made to the effect that the tort of malicious prosecution ought to be extended to civil proceedings generally because the legal bar is high, *inter alia*, because of the requirement to prove

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malice (see, *eg*, *Crawford Adjusters* at [109]−[110] *per* Lord Kerr, and *Willers* at [55]−[56] *per* Lord Toulson) becomes *much less persuasive* – not least because the requisite legal elements (here, malice) are not even clear to begin with. Finally, while we are cautious not to overstate this uncertainty given that we evince little difficulty analysing Lee Tat's claim in *malicious* falsehood below, it is noteworthy that the concept of malice in that particular context has obtained a degree of stability from the well-defined requirement – and one which is not found in the tort of malicious prosecution – that the defendant had no honest belief in, or was reckless as to, the truth of his statement.

Coherence with cognate areas of the law

100 There are yet other areas of uncertainty, the chief of which relates to the effect of extending the tort on other areas of the law. For example, in *Willers*, Lord Neuberger pointed out (at [164]) that the extension of the tort of malicious prosecution to civil proceedings generally "could well have unanticipated knock-on effects in other areas of law", including the law of privilege. Similarly, Lord Reed (who was also in the minority in that case) noted the uncertain impact that the extension of the tort would have on the law of defamation. He observed (at [184]):

> … In the present case, the basic problem facing the appellant, so far as his claim is based on damage to his reputation caused by allegations made against him in earlier civil proceedings, *is the absolute privilege accorded by the modern law of defamation.* The solution favoured by the majority results in the *circumvention of that problem by the creation or extension of another tort.* The question of where that leaves the law of defamation … appear to me to require fuller consideration than they have received. … [emphasis added]

101 Indeed, recognising malicious civil prosecution would not only circumvent the doctrine of absolute privilege, but would also undermine the doctrine's underlying policy rationale. As noted by this court in *Goh Lay Khim*

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and others v Isabel Redrup Agency Pte Ltd and another appeal [2017] 1 SLR 546 ("*Goh Lay Khim*") at [66], absolute privilege covers statements made in the course of judicial or quasi-judicial proceedings, even those which are untrue and made maliciously. This includes "everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings" (see the English Court of Appeal decision of *Lincoln v Daniels* [1962] 1 QB 237 at 257 *per* Devlin LJ). The basis of absolute privilege is that, among other things, judicial or quasi-judicial proceedings are regarded as matters in which "[f]ree speech is so significant … that complete and absolute immunity is afforded to defamatory statements" (Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 13.041, cited in *Goh Lay Khim* at [66]). It would sit uneasily with this general approach to hold that notwithstanding the doctrine of absolute privilege, a litigant may be liable for malicious prosecution in respect of things he says or does in civil proceedings. We therefore agree with the remarks of Lord Sumption in *Willers* that the extension of the tort of malicious prosecution to the civil sphere "cuts across the immunities which the law has *always recognised* for things said and done in the course of legal proceedings" [emphasis added] (at [178]).

102 In addition, extending the tort would appear to be inconsistent with another well-established principle of tort law in the area of the conduct of litigation, which is that a litigant owes no duty of care to his adversary in relation to the conduct of proceedings. The leading case is the House of Lords decision of *Jain and another v Trent Strategic Health Authority* [2009] 1 AC 853 ("*Jain*"), where it was held that a local authority which, acting on inaccurate information, had obtained an order to close down a nursing home, owed no duty of care to the proprietors of the home for the basis on which they made the

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application. In *Crawford Adjusters*, Lord Sumption, after citing *Jain*, observed that "[i]t may fairly be said that there is a difference between the negligent and the dishonest conduct of litigation", before adding that this was "not a difference which has influenced this area of the law" (at [125]), because the law seeks not to deter litigants from coming to court (at [126]). The same is true of the malicious conduct of litigation, and the point here may be conceptualised partly as a function of the general principle which we have articulated at [94]–[95] above that a bad motive does not convert the performance of a legal act into a civil wrong.

103 A final point to be made here is that even if the tort of malicious prosecution were extended to civil proceedings generally, there would remain the issue as to what sorts of damage might be recoverable – a point made by Lord Mance in *Willers* (at [130] and [141]−[145]) and acknowledged as well by Lord Neuberger (at [170]). For these reasons, we regard as inescapable the conclusion that extending the tort of malicious prosecution to civil proceedings would destabilise a significant number of well-established principles of the common law. Barring compelling policy considerations to the contrary, that is more than sufficient reason to give us serious pause when deciding whether to extend the tort in that way. And as we will see, there are, in fact, no such policy considerations in the end that point in the opposite direction.

Reasons of policy

104 In discussing reasons of policy, we are concerned in this context with legal policy and not public policy generally. By legal policy we mean policy that is within the purview of the courts, as opposed to policy that is within the purview of the legislature. It is policy whose formation, in Lord Mance's words, "does not normally depend on statistics, but rather on judges' collective

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experience of litigation and litigants and, more particularly here, their appreciation of the risks involved in litigation and the risks of its misuse" (*Willers* at [134]). Such policy is of particular relevance in this case because the tort of malicious prosecution concerns precisely the alleged need to provide a remedy to those who have suffered damage as a result of the misuse of the litigation process.

Finality and floodgates

105 We note, first, the fact that extending the tort of malicious prosecution to the civil sphere generally will *undermine the principle of* ***finality*** *in the law and legal process*. Indeed, we envisage that such an extension would encourage unnecessary *satellite litigation* – which would be especially rife amongst parties who have an unpleasant history between each other (and all the more if one or both parties have deep pockets). Indeed, *the present case* falls neatly into this description. The result would be to waste the valuable time and resources of the court. In this regard, the following observations by Lord Sumption in *Crawford Adjusters* are apposite (at [148]):

> Finally, there are real concerns about the practical consequences of any extension of the law in this area which would offer litigants an occasion for prolonging disputes by way of secondary litigation. It is no answer to these concerns to say that the bar can be set so high that few will succeed. *Malice is far more often alleged than proved.* ***The vice of secondary litigation is in the attempt****. Litigation generates obsession and provokes resentment. It sharpens men's natural conviction of their own rightness and their suspicion of other men's motives. It turns indifference into antagonism and contempt.* Whatever principle may be formulated for allowing secondary litigation in some circumstances, for every case in which an injustice is successfully corrected in subsequent proceedings, there will be many more which fail only after prolonged, disruptive, wasteful and ultimately unsuccessful attempts. [emphasis added in italics and bold italics]

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106 And, in *Willers*, Lord Mance pertinently (and very practically) observed as follows (at [132]):

> …[T]he recognition of a general tort in respect of civil proceedings would be carrying the law into unchartered waters, *inviting fresh litigation about prior litigation*, the soundness of its basis, its motivation and its consequences. The basis, motivation and consequences of individual ex parte steps, having immediate effects at the outset of litigation, are likely to relative easy to identify. The exact opposite is likely to be the position in the context of prior litigation which has extended quite probably over years. … [emphasis added]

107 Indeed, "fresh litigation about prior litigation" is precisely what we alluded to at the very beginning of this judgment (at [2] above) in saying that the parties in the present case have turned their energies from disputing about the original subject matter to disputing about the dispute itself.

108 Not surprisingly, though, Lord Wilson was not persuaded by the argument from finality. In *Crawford Adjusters*, he began by observing that the law had already permitted the tort of malicious prosecution to be invoked with regard to criminal prosecutions as well as the disparate situations (referred to briefly above at [75]). His Lordship then proceeded to observe thus (at [72(b)(ii)]): "The law has therefore already seen fit to override the argument [from finality] and the only remaining question relates to the extent to which it should do so." With respect, however, this argument is unconvincing in that it simply seeks to justify chipping away at the principle of finality *further* on the basis that cracks have already begun to appear. Again, the question is whether or not there are sound arguments of legal principle and policy that support an extension of the tort of malicious prosecution into the civil sphere generally.

109 If, as we have already noted, permitting this tort to operate in the narrower sphere is justifiable on narrow grounds, particularly in the context of

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criminal prosecutions, it is clear that the tort ought not to be extended further than is justified. In *Willers*, Lord Toulson considered that while "[t]here is unquestionably a public interest in avoiding unnecessary satellite litigation, whether in criminal or civil matters … that has not been considered a sufficient reason for disallowing a claim for malicious prosecution of criminal proceedings" (at [46]). But the proper conclusion to draw from this is not that the tort should therefore be extended. It is that there are *narrow (and even unique) reasons* for permitting an action in malicious prosecution in the context of *criminal prosecutions* – and those reasons do *not* obtain in the *civil* sphere.

110 Following from the point just considered (*viz*, the need for finality), there is the closely related danger of opening the *floodgates* of litigation – particularly where satellite litigation is concerned. In this regard, it bears repeating that there would, as a result, be a waste of the valuable time and resources of the court. Recognising the tort of malicious prosecution in civil proceedings generally could open the door to a litany of claims of a dizzying variety. We speak of "variety" in terms of the types of proceedings in respect of which malicious prosecution claims might be brought, the types of pleadings or actions which might give rise to malicious prosecution claims, the parties against whom such claims could be brought, and the stage of proceedings at which such claims might be brought. The various possibilities were identified by Lord Sumption in *Crawford Adjusters* as follows (at [147]):

> … [T]he precise ambit of the tort, if it extends to civil proceedings of a private nature will be both uncertain and potentially very wide. The Board would have created a new malice-based tort the gist of which is the malicious initiation of baseless proceedings in a manner which damages the reputation of the victim. *But if that is to be the essence of the tort, then it ought in principle to apply to the malicious abuse of disciplinary proceedings, the very proposition which the House of Lords was not prepared to accept in* Gregory. *Logically, it would also apply to any factual case advanced in civil*

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> *proceedings which maliciously and baselessly discredited another party, including a case advanced by a defendant or a third party. Logically it would extend to cases where the action was not maliciously brought but the plaintiff gave malicious evidence, or indeed to a case where a witness who was neither the plaintiff nor the directing mind and will of the plaintiff gave malicious evidence.* In the case presently before the Board, the particular abuse consisted in the introduction of a baseless allegation of fraud. But if the tort is extended to the conduct of civil proceedings, there is nothing in logic to suggest that liability can be limited to such cases. [emphasis added]

111 Similar observations were made by Lord Mance in *Willers* (at [132]–[133]). These observations point to the numerous ways in which the tort of malicious prosecution could, if recognised generally within the civil sphere, be extended far beyond the paradigm case of a claimant who alleges that the defendant maliciously commenced civil proceedings against him or her. To explore just one of these possible *further* "extensions" of the tort, if the Singapore courts do recognise the tort of malicious prosecution for civil proceedings generally, might it not be argued that there ought – as a matter of principle, logic, and fairness – to be a tort of *malicious defence* as well?

112 Several of the judges in *Crawford Adjusters* acknowledged this possibility, as well as its attendant potential problems (*per* Lord Kerr at [111]–[112] and Lord Neuberger at [194]). We note, however, that in *Willers*, Lord Toulson disagreed that recognising a cause of action for malicious defence was a "necessary counterpart" of extending the tort of malicious prosecution to civil claims (at [51]). In his view, there was an "obvious distinction between the *initiation* of the legal process itself and later steps which may involve bad faith…but do not go *to the root of the institution of legal process*" [emphasis added] (*Willers* at [51]; see also *Crawford Adjusters* at [78(g)] *per* Lord Wilson). In a similar vein, the authors of *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 22nd Ed, 2018) ("*Clerk and*

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Lindsell") at para 16-14 suggest that it is unlikely that an action will lie for malicious defence or the malicious giving of evidence in civil proceedings by a witness, because it is an essential element of the tort that there must be a *prosecution* which "set[s] the law in motion". There is no doubt that, as the law stands, the tort applies to only the institution of legal process. The difficulty, however, is that expressions such as "set the law in motion" and "go to the root of the institution of legal process" do not, in and of themselves, offer a rational basis *for why the tort should be limited to the* ***initiation*** *of legal process*. If, indeed, the concern is that baseless, damaging allegations may be raised in bad faith against an innocent party in the context of civil proceedings, it must be recognised that such damage can originate not only from a malicious plaintiff or claimant, but equally from a malicious defendant or a witness. Why, then, should a defendant who opportunistically and maliciously draws out proceedings against himself to raise a baseless and scandalous defence against his opponent be treated any differently from a plaintiff who *initiates* proceedings for the same purpose?

113 In *Crawford Adjusters*, Lord Kerr recognised the "obvious logic" in the argument that if a claim for malicious prosecution of civil proceedings is to be recognised, then an action should also lie "for malicious defence of such proceedings" (at [111]). He nevertheless took the view that it was "possible … to remain sanguine about [the] likely prevalence" of the tort of malicious defence, and pointed to the significant hurdles in proving that "the defendant knew or had notice" that the basis on which it resisted the claim was baseless and nevertheless persisted for a reason unrelated to the legitimate defence of the claim (at [113]). With respect, however, this does not meet the argument that "[t]he vice of secondary litigation is in the attempt" (*Crawford Adjusters* at [148] *per* Lord Sumption, quoted at [105] above). Even if the bar for making

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out a claim is set so high that many claims for malicious defence will fail, those claims would have failed only after significant wasteful expenditures of court time and resources.

114 Leaving aside the possibility of a tort of malicious defence, some judges in the majority in *Crawford Adjusters* argued that there was no empirical evidence for the "floodgates" argument (*per* Lord Wilson at [72(e)(ii)] and Lord Kerr at [108]). That may indeed be so. We also note that, in an empirical analysis of cases from Ontario, it was demonstrated that the broadening of the tort of malicious prosecution to civil proceedings generally had *not* opened the floodgates of litigation (see Michael Marin, "The uncertain scope of malicious prosecution: Insights from Canada" (2016) 24 Tort L Rev 80 at pp 92–96). However, it should be borne in mind that such a study is by no means conclusive. In particular, it relates to just one province in Canada. The social mores and public policy of each society (in our case, Singapore) might be quite different. In any event, given the increased (and increasing) volume of litigation in the Singapore context, if even a small percentage of cases gives rise to further claims pursuant to the tort of malicious prosecution, that would itself have a significant (and adverse) impact on the legal system as a whole. This is not, of course, a reason (in and of itself) not to extend the tort of malicious prosecution to the civil sphere generally, *but* it is certainly a factor that cannot be ignored. Indeed, it *buttresses* the case *against* such an extension of this tort.

115 We also note Lord Toulson's observation in *Willers* (at [44]) that "[t]he argument that a good claim should not be allowed because it may lead someone else pursuing a bad one is not generally attractive". With respect, however *unattractive* the argument may be, the court must squarely confront the reality that its time and resources *are finite*, and it may thus be unwise for this court to

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knowingly open itself to a *flood* of bad claims simply because there might, someday, be a good one.

116 More importantly, one ought not to underestimate the vindictiveness of human nature as demonstrated by examples of parties who continue incessantly to be embroiled in litigation. The situation may be exacerbated if the party initiating a claim in malicious prosecution has deep pockets. Indeed, a party might be driven to mount a claim pursuant to the tort of malicious prosecution even if his or her economic resources are insufficient to comfortably support the proceedings. Against the argument that all this is mere speculation stands Lord Mance's observation in *Willers* that "[j]udges have enough experience of disingenuous behaviour and procedural shenanigans on the part of litigants to form a view of sound policy in this area" (at [134]). And in our judgment and experience, it is clear that the danger of opening the floodgates of litigation is no chimera. Human beings are not angels. Disputes and ensuing litigation in the courts constitute clear evidence of this. Neither are many human beings naturally forgiving. These are the harsh – and undeniable – realities that we must confront in arriving at our decision as to whether the tort of malicious prosecution ought to be extended generally in the civil sphere.

Chilling effect

117 We are also of the view that extending the tort of malicious prosecution to the civil sphere generally will *have a* ***chilling (or deterrent) effect*** *on regular litigation in its various aspects*. In the words of Lord Sumption in *Crawford Adjusters* (at [126]), the proposed extension of the tort necessarily creates a "deterrent effect of potential liability on litigants, who may be inhibited from invoking the jurisdiction of the courts; and on witnesses, who may be inhibited

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from freely assisting in the administration of justice". In a related vein, in *Willers*, Lord Neuberger observed as follows (at [166]):

> … [T]he existence of the tort could have a chilling effect on the bringing, prosecuting or defending of civil proceedings. The notion that a person should not have to face malicious proceedings brought by a ruthless party is said to justify the existence of this tort; *but the existence of the tort severely risks creating what would be at least* ***an equally undesirable new weapon in the hands of a ruthless party, namely intimidation through the unjustified, but worrying, threat of a malicious prosecution claim to deter bona fide proceedings***. ***In other words, the creation of a remedy for one wrong is likely to lead to another wrong.*** [emphasis added in italics and bold italics]

118 The argument has been made to the effect that there is an absence of empirical evidence demonstrating that such a chilling or deterrent effect would, in fact, materialise (see, *eg*, *Crawford Adjusters* at [72(a)(ii)] and [87] *per* Lord Wilson and Baroness Hale, respectively). For the same reasons given with regard to the danger of opening the floodgates of litigation, we are of the view that extending the tort of malicious prosecution could have a possible deleterious impact, in terms of its chilling or deterrent effect on litigation, and this is not wholly speculative. To surmise that the less positive side of human nature might rear its ugly head towards genuine litigants should such a tort be so extended is by no means contrary to logic and, indeed, common sense.

Mediation

119 It is also our view that the extension of the tort of malicious prosecution to civil proceedings generally might at least possibly – if not actually – be *incompatible with* the increased (as well as increasing) shift towards integrating ***mediation*** into the legal fabric of the Singapore legal system. As was recently observed (see Andrew Phang, "Mediation and the Courts – The Singapore Experience" [2017] Asian JM 14 at para 66):

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> *The Judiciary's support for mediation has resulted in significant success and mediation has now been established as a viable dispute resolution option for resolving even the most high-value civil and commercial disputes, alongside court litigation and arbitration.* While the judicial function can never be replaced by ADR processes, a system of adjudication supported (as well as complemented) by such processes will be better equipped to deliver access to justice. In fact, there may be instances when it is indeed preferable for users to access and achieve justice through acceptable consensual outcomes, thus promoting a more gracious society in the process. [emphasis added]

Reference may also now be made to the Mediation Act 2017 (No 1 of 2017).

Availability of a remedy

120 Returning to the *broad statements* centring on justice and fairness (which we rejected as being insufficient as specific justificatory propositions (see above at [61]−[64])), could it be argued that the court concerned has ultimately failed inasmuch as it is powerless to provide a remedy (albeit in a very limited number of rare cases)? This is not, strictly speaking, correct, for there can be an award of ***costs*** – even on an *indemnity* basis (see *Quartz Hill* at 690 *per* Bowen LJ and, much more recently, *Gregory* at 429 *per* Lord Steyn as well as *Crawford Adjusters* at [180] *per* Lord Neuberger), a likely eventuality in the context of a claim that might otherwise have resulted in an award of damages for the tort of malicious prosecution if the tort were extended to civil proceedings generally. This, of course, does *not* furnish a *complete* remedy as would, for example, an award of damages (see also *Winfield and Jolowicz* at para 20-020 as well as the decision of this court in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 at [30]–[34]). Indeed, even an award of costs on an indemnity basis is a misnomer of sorts since the successful litigant is not typically awarded his or her *full* costs as such (as emphasised by Lord Wilson in *Crawford Adjusters* at [71] and Lord Toulson in *Willers* at [58], and acknowledged by Lord Sumption in

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Crawford Adjusters at [132]). However, the award of costs does offer a *partial remedy* which, as we explain below, is complemented by other tools at the court's disposal.

121 There also exist, in ***the current rules of civil procedure***, legal mechanisms for bringing claims that would otherwise constitute malicious prosecutions ***to a prompt and early end*** – *thus obviating excessive costs as well as time and effort on the part of the parties and the courts*. For example, a defendant could apply under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules") to strike out a plaintiff's statement of claim as disclosing no reasonable cause of action or as being frivolous or vexatious or as otherwise constituting an abuse of process. The existence of equivalent procedural remedies under English law was evidently a factor (among many others) which led the minority judges in both *Crawford Adjusters* and *Willers* to conclude that it was neither necessary nor desirable to extend the tort of malicious prosecution to civil proceedings generally. In *Crawford Adjusters*, for example, Lord Neuberger remarked as follows (at [196]):

> Fourthly, the United States jurisprudence provides a reminder that wrongful civil litigation should not be viewed in isolation. The courts have procedural mechanisms at their disposal to preserve and strengthen the civil litigation process, and to target proceedings brought wrongfully or mistakenly. … In circumstances where a party has not suffered special injury, the use of procedural mechanisms is preferable to "randomly providing a fortuitous amount of compensation in a handful of isolated cases".

Although his Lordship made the observations just quoted in relation to the United States experience, they embody a point of *general principle* that applies equally to the Singapore context. In a similar vein, Lord Mance observed in *Willers* that the pursuit of an unfounded claim, defence or other step in a civil proceeding had "never been actionable in itself", and had in the past been

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remedied using other devices, including "striking out, judgment or costs" (at [137]). The following observations by Lord Sumption in *Willers* are also wholly to the point (at [179], also noted by *James Lee* at p 885):

> … The courts have far more extensive powers today than they did a century and a half ago to prevent abuse of their procedures, and the closer judicial supervision of the interlocutory stages of litigation makes it easier to exercise them. Of course, these powers will not be enough to identify in time the more determined and skillful abuses, but that is part of the price to be paid for access to justice. …

122 We agree with and endorse these remarks. While costs do not provide a *complete* remedy for the harm which innocent defendants may suffer as a result of malicious and unjustified claims, this partial remedy is complemented by mechanisms such as striking out. Provided that they are employed and invoked appropriately, such mechanisms ensure that in most cases it would be possible for an aggrieved defendant to stem abusive claims at a fairly early stage, *before* significant damage is sustained. There will perhaps be cases where "the more determined and skilful abuses" of court processes (see above at [121]) cannot be nipped in the bud, but in our view these cases will be few and far between, and the desire to provide redress in such cases must be weighed against the various undesirable consequences which would arise if the tort of malicious prosecution were extended to civil proceedings generally.

123 We would also observe that on the unique facts of *Crawford Adjusters*, one of the original defendants in the underlying suit (*ie*, one of Mr Paterson's co-defendants in the original action brought against him by Sagicor) made disclosure of certain relevant documents only three months prior to the trial, and these disclosures, in turn, resulted in Sagicor's discontinuation of the original action only days before the trial itself. In these circumstances, Mr Paterson was unable to invoke the relevant rules of civil procedure which might otherwise

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have allowed an early termination of the proceedings against him (*Crawford Adjusters* at [21]). This is an unusual fact situation and, had there not been this unfortunate delay in disclosure of the relevant documents, the proceedings in this case might have ended sooner. Indeed, it was after the discontinuation of the action that Mr Paterson was granted leave to amend his counterclaim to include a claim pursuant to the tort of abuse of process (the tort of malicious prosecution, although not pleaded by Mr Paterson, was also considered as an alternative claim).

124 The idea that existing procedural remedies are adequate is supported by the effect of US jurisprudence, an analysis of which Lord Neuberger undertook in *Crawford Adjusters* (at [165]−[196]; reference may also be made to William C Campbell, "Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis" (1979) 88 Yale LJ 1218). His Lordship's discussion is of immense relevance to the point being made here. If we may say so, despite the controversy that existed amongst the various state jurisdictions in the United States, his Lordship managed to distil the main points in a clear and effective manner within a relatively brief compass.

125 Of especial importance were the observations pertaining to the prevalence of the "English rule" and the "American rule", as they have come to be known in United States jurisprudence. Under the so-called English rule, the tort is not made out unless the plaintiff can establish that the previous proceedings brought against him or her by the defendant caused him "special injury" – *ie*, "something more than the expense, distress and reputational loss that is ordinarily suffered as a result of wrongful litigation". (We note in passing that while American courts have termed this the "English rule", this has never been the modern position in England whether before or after *Crawford Adjusters* and *Willers*.) On the other hand, the American rule permits recovery

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if the defendant "participated in instigating or continuing a civil proceeding … without probable cause and for an improper purpose, provided that the proceeding had been terminated favourably to the now-plaintiff" (*Crawford Adjusters* at [173]–[174] *per* Lord Neuberger, citing Dobbs, Hayden & Bubick, *The Law of Torts* vol 3 (Thomson West, 2nd Ed, 2011) at pp 408 and 416–417). In Lord Neuberger's view, it was significant that, putting aside legislative intervention, courts in the United States had been almost as likely to adopt the narrower English rule as the American rule. His Lordship thus observed as follows (at [193]):

> … *[E]ven in* a jurisdiction where successful defendants rarely can expect to recover their costs, there seems to be *as strong judicial support for the English rule as for the American rule*. That might at first sight appear to be a somewhat cheap or lazy point, but I believe that it has real force. In a highly developed common law country, where the issue has been considered in far greater depth and by almost infinitely more judges than here, there is about as much support for adhering to the English rule as there is for departing from it, even though there is a significantly stronger case for departure than there is here. [emphasis added]

126 His Lordship further noted that the requirement under the English rule that a plaintiff should only be able to claim in respect of wrongful litigation if he had suffered "special injury" appeared to be attributable to the American courts' understanding that since *costs sanctions* were available under English law, the action for malicious prosecution was only needed if a plaintiff had suffered injury "over and above the ordinary emotional and financial damage" accompanying litigation (*Crawford Adjusters* at [176]–[177]). A number of judges who had preferred the American rule had done so on the basis that, unlike their English counterparts, American defendants did *not* have the ability to recover their costs (*Crawford Adjusters* at [186]). Subsequently, reiterating this point in *Willers*, Lord Neuberger observed (at [169]):

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> … [A]s I discussed in *Crawford* [*Adjusters*], paras 170—175 and 181—190, unlike courts in England and Wales, courts in the United States of America have considerable experience of claims for malicious prosecution in the civil field. The state courts are pretty evenly divided as to the existence of the wide tort contended for by the appellant. Many state courts which accept the existence of the wide tort justify departing from what they understand to be the law in England on the basis that "The English rule is that generally the loser must pay the winner's attorneys' fees" and so "an English plaintiff who brings a frivolous suit does so as the peril of paying his adversary's litigation expenses" (to quote Ciparick J in *Engel v CBS Inc* (1999) 711 NE 2d 626, 629). *Thus, even though the costs sanction which applies to litigation in this jurisdiction is largely absent in the United States, a substantial proportion of the courts in that jurisdiction have set their face against the existence of this tort, and many of those that accept it justify their view by reference to the absence of the costs sanction which is routinely available in our courts.* [emphasis added]

127 The (buttressing) point made by Lord Neuberger (as embodied in the quotations in the preceding two paragraphs) is one that we would wholly endorse. It is telling that even in the United States, where the courts do not generally compensate successful litigants for the expense of resisting baseless claims through costs orders, many states nevertheless apply a *more stringent* form of the tort of malicious prosecution by maintaining the additional requirement that the claimant must have suffered "special injury" to receive tortious redress. Seen in that light, it would be strange for a jurisdiction such as *ours*, where costs orders are part and parcel of most litigation, to recognise the tort in the form contended for by Lee Tat and applied in *Crawford Adjusters* – which is *less stringent* than the so-called "English rule" in so far as it does *not* require the claimant to demonstrate "special injury" (see the elements of the tort above at [41]).

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Conclusion

128 For the reasons set out in this part of the judgment, we are of the view that the tort of malicious prosecution should ***not*** be extended to civil proceedings generally. Indeed, the case against such extension appears to us to be overwhelming. And although this is by no means even close to a conclusive factor, we also note the reference in a leading English textbook to "the powerful dissenting opinions of Lord Sumption and Lord Neuberger" in *Crawford Adjusters* as well as to the fact that "[t]he differences between the majority and the minority [in *Crawford Adjusters*] were very fundamental indeed" (see *Winfield and Jolowicz* at para 20-021; reference may also be made to *Street* at p 611). Similarly, in yet another leading English (practitioner) textbook, it was observed that there were "two strong dissenting judgments" in *Crawford Adjusters* (see *Clerk and Lindsell* at para 16-02). Academic recognition of the force of these judgments may be presumed not to have been given lightly, and should therefore in our view not be ignored.

Even if the tort were extended

129 The above conclusion makes it unnecessary for us to consider Lee Tat's claim in malicious prosecution any further. Nevertheless, and for completeness, we wholly agree with the Judge's finding that the tort is clearly not made out. Lee Tat has failed to establish a lack of reasonable and probable cause on the MCST's part. It has also failed to establish malice.

130 As for the alleged lack of reasonable and probable cause, it cannot seriously be suggested that the MCST did not at least have "a case fit to be tried" (*Zainal bin Kuning* at [56]) when it brought the Third and Fifth Actions. With regard to the Third Action, it was neither obvious nor clear-cut that Grange Heights residents were not entitled to use the Right of Way (or to repair or

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maintain it, as they sought to do by bringing the Third Action). On the contrary, and as the Judge noted, at that stage the Amalgamation Issue had been considered and decided in the MCST's favour in the Second Action (see the Judgment at [58]). In fact, from 1997 to 2004 the MCST had instituted contempt proceedings against Lee Tat for breaching the terms of the injunction granted by Coomaraswamy J in the Second Action (see [23] above) and Lee Tat had responded in a manner which showed that it recognised that it was not entitled to obstruct the Right of Way (see the Judgment at [61]–[64]).

131 Lee Tat has suggested that the MCST lacked reasonable and probable cause because it was obvious, and the MCST must have known, that the Extension Issue had yet to be decided in the Second Action. That argument is, with respect, untenable. Surely the clearest illustration that it was neither obvious nor clear-cut that the Extension Issue had been decided lies in the fact that notwithstanding Chao JA's views that the issue had *not* been decided, the majority in the Fourth Action took the opposite view (see [28]–[29] above). There is absolutely nothing to suggest that the MCST brought the Third Action without believing that it had a "case fit to be tried" on its entitlement to repair and maintain the Servient Tenement. The suggestion that it must have been "obvious" to the MCST that it was not entitled to use the Right of Way is (a) made in hindsight and (b) speculative and unsubstantiated by any evidence as to the MCST's actual state of mind at the relevant time.

132 To address the latter problem, Lee Tat argues strenuously that an adverse inference should be drawn against the MCST for its failure to produce legal advice which it received in connection with the commencement of the various proceedings. In fact, Lee Tat applied unsuccessfully for specific discovery of this legal advice. Its application was dismissed on the ground that the advice was covered by legal professional and/or litigation privilege. In our view,

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nothing can be made of the fact that the MCST has chosen not to waive that privilege. As the Judge noted, there could be numerous reasons why the MCST may have taken that stance (see the Judgment at [74]) and it would be inappropriate to speculate on the contents of the legal advice. Moreover, as noted by this court in *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829, it would render privilege otiose to say that "when a party refuses to permit professional confidence to be broken, everything must be taken strongly against him" (at [55], citing the House of Lords decision in *W C Wentworth v J C Lloyd* (1864) 10 HLC 589).

133 As for the Fifth Action, this was the MCST's application to determine whether the Court of Appeal could be reconstituted to hear an application to set aside its own judgment. Save for Lee Tat's contention that adverse inferences should be drawn against the MCST for failing to disclose its legal advice (see the Judgment at [75]), there was no evidence, and very little argument, to establish that the Fifth Action was commenced by the MCST without a belief that there was a case fit to be tried.

134 The element of malice is also not made out. Lee Tat's *own* case is that malice took the form of the MCST's wanting to "secure for itself a right which it was in fact not legally entitled to have – namely, the right to use the Right of Way for pedestrian traffic between Grange Road and Lot 561". Yet there is nothing "improper and indirect" (*Zainal bin Kuning* at [84]) about the fact that the MCST sought to assert its Right of Way over the Servient Tenement. That was plainly and directly the very outcome which the MCST sought to achieve. The fact that we now know the MCST was "in fact not legally entitled" to the outcome it hoped to achieve cannot be a ground for imputing malice or any improper motive to the MCST.

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135 We turn now to consider Lee Tat's claim in abuse of process.

Issue 2: Abuse of process

General observations

136 Abuse of process is not a concept that is unfamiliar to the law. A person who commences proceedings for the predominant purpose of achieving something other than what the legal process was designed to achieve – that is, a legal remedy and reliefs which are reasonably related to that process – is someone who has abused the process of the court. In the realm of civil procedure (and this is a point of some importance), the court has the inherent jurisdiction to strike out proceedings which are an abuse of its process (see, *eg*, O 18 r 19(1)(*d*) of the Rules and the decision of this court in *Ko Teck Siang and another v Low Fong Mei and another and other actions* [1992] 1 SLR(R) 22 at [15], citing the English Court of Appeal decision of *Wenlock v Moloney and others* [1965] 1 WLR 1238 at 1243–1244). It is also clear that the court is entitled to refuse equitable relief on the ground of abuse of process (see the decision of this court in *JTrust Asia Pte Ltd v Group Lease Holdings and others* [2018] 2 SLR 159 at [101] *per* Steven Chong JA). The provenance of this jurisdiction is the court's overriding duty to ensure the proper administration of justice, which entails the power to ensure that its process is not abused and its resources not put to waste (see the House of Lords decision of *R v Sang* [1980] 1 AC 402 at 455 *per* Lord Scarman). However, it is one thing to say that the court has powers to prevent abuses of its process and to refuse equitable relief on the basis of an abuse of process. Whether an abuse of the court's process resulting in damage to the defendant attracts *tortious liability* is quite another matter.

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137 Exactly 180 years ago, the Court of Common Pleas supplied a positive answer to that question in its decision in *Grainger v Hill and another* (1838) 4 Bing NC 212 ("*Grainger*"), which was given expressly on the footing that there was no previous authority. It therefore constitutes the origin of the tort of abuse of process. Since then, however, the principle in *Grainger* has been rarely applied and, even then, rarely successfully. In the English Court of Appeal decision of *Land Securities plc and others v Fladgate Fielder (a firm)* [2010] 2 WLR 1265 ("*Land Securities*"), it was observed that the only two English cases in which the tort of abuse of process has been successfully invoked were, in effect, *Grainger* and *Gilding*. In the words of Etherton LJ (as he then was) in *Land Securities* (at [41]; see also *per* Moore-Bick and Mummery LJJ at [81] and [113], respectively):

> If *Gilding's* case … is properly to be regarded as an example of a [*Grainger*] tortious abuse of process, then it is the last reported case in which such a claim has succeeded in this jurisdiction. If not, then [*Grainger*] itself is the first and last such case. Accordingly, the last reported successful action in this jurisdiction for the tort abuse of process was either about 140 or 170 years ago.

138 Indeed, it was observed in a leading textbook that "as a result of the decision in [*Land Securities*], it seems that [the tort of abuse of process] is not intended to be a growth area" (see *Winfield and Jolowicz* at para 20-024), although that same book acknowledged the existence of *Crawford Adjusters* (*ibid*).

139 Nevertheless, as we shall see, the tort has enjoyed something of a resurgence in other Commonwealth jurisdictions. However, with the exception of a few, many cases which have recognised the existence of this tort do no more than assume its existence and provide no analysis of its necessity and of its relationship with other cognate torts and procedural rules which appear to

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serve very much the same purpose for which the tort is said to exist. That analysis is our task, and we begin by considering the decided cases.

The decided cases

140 The early history of the tort involved cases in which a coercive interlocutory remedy was obtained on an *ex parte* basis for the purpose of extorting property from the defendant. The basis on which these cases were decided, however, was expressed in the form of a general principle that "taking the property of another without his consent, by an abuse of the process of the law, must be deemed a wrongful taking" (see *Grainger* at 221 *per* Tindal CJ). In *Grainger*, the defendant mortgagees of the plaintiff's ship were anxious to recover their loan before it was due for payment. So they procured a writ of capias directing the sheriff to arrest the plaintiff, who was made to give up the ship's register. After being discharged from the arrest, he sued the defendants for the loss caused by his inability to carry on business due to the arrest, and the court allowed his claim. Tindal CJ, with whom Park J agreed, as well as Vaughan and Bosanquet JJ, characterised the plaintiff's action as being for "abusing the process of the law" or "abusing the process of the Court" for the "purpose of extorting property", a purpose which Bosanquet J described as "ulterior" (at 221 and 223–224). Tindal CJ also observed that "it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause" (at 221).

141 In *Gilding*, which is the only other English case in which the tort was successfully established, the defendant creditor procured a writ of *capias ad satisfaciendum* directing the sheriff to arrest the debtor and to exact from him payment substantially exceeding the true amount due. Refusing to pay the excess sum, the debtor was arrested by the sheriff and had to pay the sum to

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obtain his release. He then sued the defendant successfully to recover that sum. The defendant pointed out that the plaintiff's failure to obtain a discharge of the arrest suggested that the arrest was not without reasonable and probable cause and also that the former proceeding had not been terminated in his favour. But the Court of Common Pleas disregarded this fact and held that the plaintiff had a "good cause of action" (at 604). Willes J, delivering the court's judgment, stated that the plaintiff had not brought an action for malicious arrest or prosecution, but had alleged that "the defendant ha[d] maliciously *employed the process of the court* in a terminated suit, in having by means of a regular writ of execution *extorted money* which he knew had already been paid and was no longer due on the judgment" [emphasis added] (at 604).

142 After the 1860s, there began a long period of quiescence for this particular tort. A probable reason for this is the introduction of rules of procedure which provided for a clear mechanism for curbing abuses of the court's process. (This is a point of some significance, as we shall later explain). In 1883, the first edition of the Rules of the Supreme Court was brought into force in England pursuant to the landmark Judicature Acts of 1873 and 1875 which had effected the procedural fusion of the administration of law and equity. O 19 r 27 and O 25 r 4 of the 1883 Rules were later consolidated into O 18 r 19 in subsequent versions of the English Rules of Court, which empowered the court to strike out any pleading which constitutes an abuse of process. In Singapore, the equivalent rules were O 20 r 26 and O 26 r 4 of the (Straits Settlements) Civil Procedure Rules of the Supreme Court 1934 (No 2941 in the Straits Settlement Gazette 93 of 18 December 1934), and, like their counterparts in the 1883 Rules, they were consolidated into O 18 r 19 of our current Rules. Apart from the power to strike out, the power to award costs on an indemnity basis was developed as a method of penalising parties for

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bringing abusive proceedings. The cross-undertaking as to damages when interlocutory injunctions are granted was also developed as a protection for a defendant against whom such an injunction was granted. These procedural weapons would have enabled the courts to nip in the bud most instances of abuse of process and even to secure compensation for defendants who had been subjected to abusive proceedings. The need to rely on the tort would appear therefore to have correspondingly diminished.

143 However, beginning in the 1970s, the tort experienced a resurgence in the Commonwealth, particularly in Canada and Australia (see generally John Irvine, "The Resurrection of Tortious Abuse of Process" (1989) 47 CCLT 217). Thus, in the decision of the Supreme Court of British Columbia in *Guilford Industries Ltd v Hankinson Management Services Ltd* 1973 Carswell BC 198 ("*Guilford*"), where the court relied on *Grainger*, the plaintiff succeeded in his claim in the tort, and was awarded damages for the defendants' malicious filing of a mechanics' lien upon proof that this had been done purely to extort a settlement in a business dispute. In *DK Investments Ltd v SWS Investments Ltd* (1984) 59 BCLR 33, also a decision of that court, the defendant succeeded in his counterclaim in the tort, and was awarded damages, upon proof that the plaintiff had abused the court's process for the ulterior purpose of coercing the defendant into foregoing its strict contractual rights and selling a commercial property at a reduced price.

144 In Australia, the Queensland Supreme Court in 1989 awarded damages for abuse of process upon proof that the defendant had applied to wind up the plaintiff company for the predominant object of forcing its board of directors to negotiate with the defendant (see *QIW Retailers Limited v Felview Pty Ltd* [1989] 2 Qd R 245). That case was cited with approval in the leading decision of the High Court of Australia in *Williams v Spautz* (1992) 174 CLR 509 at 553

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per Gaudron J. In that case, the High Court was concerned with whether to exercise its inherent jurisdiction to grant a permanent stay of multiple proceedings that a university lecturer had instituted against the university and its members. Mason CJ observed (at 522) that in elucidating the principles governing this jurisdiction, the courts "have had regard to the tort of collateral abuse of process", which had been recognised in England (citing *Grainger*), the United States and Canada (citing *Guilford*), and by the High Court itself in *Varawa v Howard Smith Company Ltd* (1911) 13 CLR 35 as well as *Dowling v The Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509, although Mason CJ observed that the tort was not established in either of the last-mentioned Australian decisions.

145 Back in England, the existence of the tort continued for a period to be acknowledged with mixed enthusiasm. On the one hand, Falconer J in 1984 declined an invitation to declare that the tort had long since perished from desuetude, considering it a task best left for an appellate court (see the English High Court decision of *Digital Equipment Corp v Darkcrest Ltd* [1984] 3 WLR 617 at 627C–E). In *Land Securities*, the English Court of Appeal declined to extend the tort, on the assumption that it existed, to judicial review proceedings and also to recovery of economic loss. On the other hand, in *Speed Seal Products Ltd v Paddington and Another* [1985] 1 WLR 1327 ("*Speed Seal*"), the English Court of Appeal upheld the grant of leave to the defendants to amend their pleadings to include an allegation that the plaintiffs had brought the action for the purpose of damaging the defendants' business, on the ground that *Grainger* "provides a basis for an arguable case that there has been an actionable abuse of the process of the court" (at 1335H *per* Fox LJ). And in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc and Another* [1990] 3 WLR 563, the plaintiff alleged that the defendants had abused the court's process by

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submitting a false case for the primary purpose of defeating claims to the return of the plaintiffs' metal and to prevent the grant of a freezing injunction. The English Court of Appeal considered it "at least well arguable" that the tort of abuse of process existed, and held that the requirements of the tort were not satisfied because the defendants' actions were directed towards sustaining their defence (at 612H–613A *per* Slade LJ).

146 However, more recently, the Board in *Crawford Adjusters* recognised the existence of the tort in English law in no uncertain terms. Although the members of the court were divided on whether the tort of malicious prosecution extended to civil proceedings, they were unanimous in their view that the tort of abuse of process was a recognised cause of action. That said, it is significant, in our view, that Lord Sumption appeared to be at pains to emphasise how rarely the tort had been pleaded successfully. In his Lordship's view, the cases where it could be demonstrated that a litigant had used the process of the court for the purpose of obtaining some wholly extraneous benefit not reasonably related to the relief sought would be "extremely rare". Indeed, his Lordship remarked that "[the tort of] abuse of process is on the verge of extinction, the only recent sightings being in Australia" (at [149]).

147 The experience of two other jurisdictions may be mentioned briefly for completeness. In New Zealand, the Court of Appeal in *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281, citing *Grainger* and *Speed Seal*, and *Burns v National Bank of New Zealand Ltd* [2004] 3 NZLR 289, citing *Grainger*, recognised that the tort exists, although no claim in the tort appears to have been successfully established in that jurisdiction. The same is true of Malaysia. While the Malaysian courts seem to have accepted the existence of the tort (see the judgment of Mahadev Shankar J in the Malaysian High Court decision of *Gasing Heights Sdn Bhd v Aloyah bte Abdul Rahman & Ors* [1996] 3 MLJ 259,

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and of the Malaysian Court of Appeal in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazarudding Bin Ungku Mohamed* [1998] 2 MLJ 425), they have not actually allowed a claim founded on abuse of process.

148 It can be seen, therefore, that there is a relatively stable body of authorities in the Commonwealth which support the existence of the tort of abuse of process. However, with the exception of *Land Securities* and, to some degree, *Crawford Adjusters*, none of these cases offers any detailed analysis of the reasons of principle and policy behind the need to attach tortious liability to the perpetrator of such abuse, particularly in the light of the existing rules of civil procedure. As the issue before us is whether we ought to recognise this tort in Singapore, it is necessary to undertake that analysis. This we now turn to do.

149 We are of the view that it would be inappropriate to introduce this tort in the Singapore context. The first point we would make is that there is a close relationship between the torts of abuse of process and malicious prosecution. Though they are distinct causes of action, it seems to us that many factual situations which would found a cause of action in one of these torts would also found a cause of action in the other. The similarity between these two torts was recognised by both Lord Toulson (at [25]) and Lord Clarke in *Willers* (at [62]). In particular, Lord Toulson remarked as follows (at [25]):

> [*Grainger*] has been treated as creating a separate tort from malicious prosecution, but it has been difficult to pin down the precise limits of an improper purpose as contrasted with the absence of reasonable and probable cause within the meaning of the tort of malicious prosecution…It might be better to see [*Grainger*] for what it really was, an instance of malicious prosecution, in which the pursuit of an unjustifiable collateral objective was evidence of malice, rather than as a separate tort. … *It is unnecessary to express a firm view on this point, but [Grainger] does at any rate illustrate the willingness of the court to grant a remedy, in what it regarded as novel circumstances, where the plaintiff had suffered provable loss as a result of civil*

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> *proceedings brought against him maliciously and without any proper justification.* [emphasis added]

150 It will be seen from the above quotation that the torts of abuse of process and malicious prosecution are similar not only as to their elements but also as to their underlying rationale and the curial impulses which have given rise to their existence. Both torts stem from a common instinct that a remedy should be provided to those who suffer injury as a result of abusive legal proceedings brought against them. At the same time, the recognition of either malicious prosecution or abuse of process would, in our view, give rise to many common problems. In light of this, it should hardly be surprising that many of the same policy reasons that led to our decision not to extend the tort of malicious prosecution to civil proceedings generally have also led us not to recognise the tort of abuse of process.

Reasons of policy

Finality and floodgates

151 As mentioned (see [104]–[108] above), extending the tort of malicious prosecution to the civil context generally would undermine the principle of ***finality*** in the law, in that this would encourage unnecessary satellite litigation and drag out disputes. In our view, the same consideration weighs against the recognition of the tort of abuse of process, which, like malicious prosecution, would largely be pleaded in the context of "fresh litigation about prior litigation".

152 We recognise that unlike the tort of malicious prosecution, the tort of abuse of process does not require the proceeding which is alleged to be abusive to be first terminated in favour of the party relying on the tort. A claim in abuse of process may be brought, for example, as a counterclaim in an action which is

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alleged to be abusive, and the claim will be capable of being dealt with in the same allegedly abusive proceedings. Nevertheless, abuse of process *may* also be pleaded in the exact manner in which it has been pleaded in *the present case* – *ie*, many years after the allegedly abusive proceedings have already concluded.

153 In our view, the danger remains that recognising the tort of abuse of process would encourage satellite litigation and prolong disputes, particularly among parties who have animosity between them. In this regard, we reiterate our earlier observations concerning litigation and its capacity to bring out the unpleasant side of human nature (see [116] above). In light of this, it is almost certain that many claims in abuse of process, if the tort were recognised, would take the form of unmeritorious, vindictive attempts, and this would ultimately result in the wastage of the court's time and resources.

154 We have also noted (at [110]–[112] above) that there is the closely related danger of opening the floodgates of litigation. Recognising the tort of abuse of process would also open the courts to the same variety of claims that would arise in respect of malicious prosecution in the civil sphere. Once the abusive institution of legal proceedings is recognised as capable of giving rise to tortious liability, why would the boundaries of the tort end there? Logically, a claim for abuse of process might be founded not only on the *institution* of civil proceedings, but also any step taken within civil proceedings for a predominant purpose other than that for which that step was designed (*Crawford Adjusters* at [149]).

155 We recognise that a counter to the "floodgates" argument might be mounted based on the English experience. But as we have noted, there is a paucity of case law on the tort of abuse of process emanating from that

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jurisdiction. *Grainger* and *Gilding* appear to be the only two cases where the tort has succeeded. Even taking into account the cases where the tort has been argued unsuccessfully, the relatively small amount of case law suggests that there is some truth to the view expressed by Lord Sumption in *Crawford Adjusters* at [149] that the tort appears to be "on the verge of extinction" in its own country of birth (see [146] above). If this is indicative of how the tort is likely to be received and applied in other jurisdictions as well, then the concerns about opening the floodgates of litigation lose much of their force. To this, however, we would make two points in response. The first is that it is unclear whether the English experience *can* be taken as being so indicative. Indeed, notwithstanding the fact that the tort appeared to have fallen into desuetude in England (at least prior to *Crawford Adjusters*), it has taken a different course in Australia where litigants "appear to have been both more persistent and more successful" (*Crawford Adjusters* at [149] *per* Lord Sumption). The second point we would make is that if indeed the tort has been utilised so very rarely, and if indeed the English experience is indicative of the tort's likely reception in the Singapore context, then there may not be any point in introducing it in our jurisdiction, absent persuasive reasons to the contrary.

Chilling effect

156 Further, as noted above in relation to the extension of the tort of malicious prosecution, recognising the tort of abuse of process may create a ***chilling effect*** on regular litigation. Litigants considering commencing civil proceedings would need to be mindful of the risk that they may be sued or found liable for abuse of process. Of course, to some extent, the potential chilling effect is addressed and limited by the fact that a claim in abuse of process is rather difficult to establish, even in jurisdictions where the tort is recognised. That is clear from the survey we have undertaken at [140]–[147] above. Yet,

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like malice, abuse of process may be "far more often alleged than proved" (*per* Lord Sumption's remarks on the tort of malicious prosecution in *Crawford Adjusters* at [148]) and in such cases, "[t]he vice of secondary litigation is in the attempt" (*ibid*). In other words, *despite* the difficulty of successfully claiming in abuse of process, recognising the tort may *still* carry a chilling or deterrent effect because litigants may be deterred by the *threat or possibility* of being sued for abuse of process.

Availability of a remedy

157 Finally, as we have demonstrated with respect to malicious prosecution at [120]–[122] above, one policy reason weighing against the recognition of the tort of abuse of process is that there are other remedies available to address the problem of abusive litigation. There exists – for the vast majority of cases – a system of various rules of civil procedure which deal precisely with various aspects of abuse of process of the court. Such rules permit a defendant to apply to the court to prevent such abuse − often well before the claim concerned has progressed significantly within the court's system. Where the facts support a suggestion that the plaintiff is abusing court processes for an ulterior purpose, the defendant may apply to the court to strike out the plaintiff's statement of claim as disclosing no reasonable cause of action or as being frivolous or vexatious or as otherwise constituting an abuse of process. Conversely, where the defendant's conduct of his case constitutes an abuse of process, the plaintiff can, for example, apply for summary judgment against the defendant pursuant to O 14 of the Rules.

158 At this juncture we return to a point already mentioned above (see [142]), which is that it seems entirely plausible that the tort of abuse of process fell into a period of inactivity after the 1860s *precisely because* the rules of civil

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procedure provided for a clear mechanism for curbing abuses of the court's process. In this regard, the dates on which the leading decisions of *Grainger* and *Gilding* were decided, *viz*, in 1838 and 1861, respectively, are extremely significant because they fell *before* the English Rules of the Supreme Court were first promulgated in *1883*. In the egregious situations that formed the basis of the respective courts' award of a remedy for the tort of abuse of process in both *Grainger* and *Gilding*, the award of such a remedy was probably the only legal avenue that enabled the respective courts to achieve a just and fair result. Presumably, if the legal issues in those cases had arisen *after* the promulgation of the 1883 Rules, the respective abuses of process might have been addressed at an earlier stage of the litigation process.

159 Thus, it is not the case that innocent litigants who are put to the inconvenience and unpleasantness of abusive civil proceedings are completely without a remedy. In most situations, the Rules would provide just the avenue for parties to seek redress.

160 Finally, as was also our view as to why the tort of malicious prosecution should not be extended to civil proceedings generally in Singapore, we are of the view that the introduction of the tort of abuse of process might at least possibly – if not actually – be *incompatible with* the increased (as well as increasing) shift towards integrating ***mediation*** into the fabric of the Singapore legal system – a point which we have already elaborated upon above (see [119]) in relation to the tort of malicious prosecution.

161 For the reasons set out in this part of the judgment, we do ***not*** recognise the tort of abuse of process in Singapore and reiterate the point that there are ample legal mechanisms within the existing rules of civil procedure that afford innocent parties adequate legal remedies in the event that there is indeed an

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abuse of process by the party concerned on the other side. *For this reason **alone**, it is clear that the appeal on this particular issue must fail simply because, like the issue raised in relation to the tort of malicious prosecution, Lee Tat's claim cannot even take off since the **legal basis** upon which it premises that claim **does not exist***.

162 We should add, however, that ***even if*** this court recognised the extension of the tort of abuse of process, Lee Tat's claim would ***still fail on the relevant facts***. Let us elaborate.

Even if the tort were recognised

163 As made clear by Lord Sumption in *Crawford Adjusters* at [149], an illegitimate purpose is one which seeks "some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought". Having "an ulterior purpose in view as a desired byproduct of the litigation" (see the English Court of Appeal decision of *Goldsmith v Sperrings Ltd and others* [1977] WLR 478 at 503) does not amount to an illegitimate purpose.

164 Lee Tat's *own* submission is that the MCST's "collateral purpose" was to enhance the value of its own land by retaining the Grange Heights address and name. We fully agree with the Judge that this was not a purpose which was not reasonably related to victory or a favourable result in the proceedings (see the Judgment at [35]). In other words, the benefit which the MCST sought was not "wholly extraneous", but rather was closely connected with the relief which the MCST hoped to obtain in the proceedings. Retaining Grange Heights' name and address was wholly contingent on the existence of the MCST's purported

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Right of Way, which was the subject matter of the Second to Fifth Actions (see the Judgment at [35]).

165 For these reasons, we uphold the Judge's decision to reject Lee Tat's claim in abuse of process, even assuming that the tort of abuse of process exists in the first place (which we have held is *not* the case).

Issue 3: Malicious falsehood

166 We turn now to the claim in malicious falsehood. Lee Tat argues that the 1997 and 2007 Statements were false at the time they were made. It criticises the Judge's finding that the "weight of judicial authority at the time of the [Statements] was firmly in favour of the MCST enjoying a right of way over the Servient Tenement" (see the Judgment at [110]). To the contrary, Lee Tat argues that in 1997, the Second Action had determined only that Lee Tat was not entitled to erect a gate and fence on the ends of the Servient Tenement. It had *not* been determined that the Right of Way could be used for the benefit of Lot 561. Furthermore, Lee Tat asserts that the Judge effectively disregarded the Court of Appeal's finding in the Third Action that the Right of Way had already been extinguished by operation of law, and that the Extension Issue had never been decided on the merits.

167 Lee Tat also argues that the Statements were made "carelessly, recklessly and/or with the dominant intention of injuring Lee Tat as a property developer". It argues that the MCST was aware at all times that Lee Tat was a property developer and that, by asserting the Right of Way over the Servient Tenement, the MCST knew that it would "naturally injure" Lee Tat as such, by preventing Lee Tat from developing the Servient Tenement.

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168 The MCST essentially argues that the Judge was right to find that the Statements were not made with knowledge of falsity or recklessness as to the truth because, among other things, the weight of judicial authority was in the MCST's favour at the time.

The law on malicious falsehood

169 As the Judge noted, there are four elements to the tort of malicious falsehood (see the Judgment at [93], citing *Golden Season* at [159] and *WBG Network* at [68]):

(a) the defendant must have published to third parties words which are false;

(b) the words must refer to the claimant, his property or his business;

(c) the words must have been published maliciously; and

(d) special damage must have followed as a direct and natural result of the publication.

170 The parties' arguments raise questions in relation to the first and third of these elements, *ie*, whether the Statements were false at the time they were made and whether the Statements were published maliciously. We address each of these issues in turn.

The falsity of the Statements

171 The 1997 Statement asserted that "the estate's owners had the right to use the road forever – for walking as well as for driving", and that "the residents could not give up the right to access because it was a valuable piece of land".

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The 2007 Statement asserted that Grange Heights enjoyed "[c]onvenient access from Grange Road".

172 There are essentially two planks in Lee Tat's argument that these Statements were false at the time they were made:

(a) First, the Statements were false because the MCST did not actually have any judicial authority supporting its claim that it was entitled to the Right of Way, whether in 1997 or 2007. In 1997, the Second Action had not actually determined that the MCST was entitled to use the Right of Way to access Lot 561. Further, in both 1997 and 2007, the Extension Issue had never actually been decided on the merits.

(b) Secondly, the Statements were false because the Right of Way had been extinguished in 1976 upon the amalgamation of Lots 111-34 and 561.

173 In so far as the first argument is concerned, for the reasons stated by the Judge at [101]–[106] of the Judgment, we find that there is no merit whatsoever to Lee Tat's contention that the courts in the Second and Fourth Actions had not actually determined that the MCST was entitled to use the Right of Way.

174 With regard to the Second Action, we agree fully with the Judge that the judgments were "clearly grounded on the premise that the MCST and Grange Heights residents were legally entitled" to use the Right of Way (see the Judgment at [103]). Lee Tat argues that the only issue determined in the Second Action was "whether Lee Tat was entitled to erect the gate at one [end], and, the fence at the other end of the [S]ervient [T]enement or do similar acts to prevent the MCST from using the [S]ervient [T]enement". In our view, this argument is pedantic and entirely disingenuous. Obviously, the main issue in the Second

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Action was whether the MCST was entitled to an injunction preventing Lee Tat from obstructing the MCST's access to the Servient Tenement. However, the point is that it would have been utterly meaningless for the courts to have granted the MCST such relief *unless* the MCST *was* entitled to the Right of Way. The fact that the High Court granted the MCST this injunction, and that this decision was upheld by the Court of Appeal, necessarily implied that the MCST was entitled to a right of way over the Servient Tenement. Thus the Judge was entirely justified in saying that the MCST had "[t]he weight of judicial authority" in its favour (see the Judgment at [110]) at the time when it made the 1997 Statement.

175 As for the Third and Fourth Actions, for the reasons stated by the Judge in [104] of the Judgment, we wholly agree that the decisions in *Grange Heights (No 4) (HC)* and *Grange Heights (No 4) (CA)* as well as the decision in *Grange Heights (No 3) (HC)* were made on the basis that the MCST and Grange Heights residents were entitled to use the Right of Way. Thus, we reject the argument that the MCST had no judicial authority supporting the 1997 Statement and the 2007 Statement.

176 The true question, however, is not whether the Statements were supported by judicial authority, but whether they were *false*. The thrust of Lee Tat's argument is that the statements *were* false because the "true legal position" was that the amalgamation of Lots 111-34 and 561 had extinguished the Right of Way in 1976.

177 The question of whether the Statements were false when they were made is not a straightforward one to answer. As noted above, the state of play at the material times (both in 1997 and 2007) was such that there had been judicial pronouncements stating or suggesting that Grange Heights residents were

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entitled to use the Right of Way. On the other hand, it is now clear with the benefit of hindsight that the amalgamation of Lots 111-34 and 561 extinguished the Right of Way in 1976 (see [32] above). This was the finding of the Court of Appeal in *Grange Heights (No 3) (CA)*. As the Judge acknowledged at [132] of the Judgment, that decision is retroactive in that the MCST's Right of Way must be taken to have been extinguished at the point in time when Lots 111-34 and 561 were amalgamated. It is now also clear that based on the *Harris v Flower* principle, the Right of Way did not extend to Lot 561 (see [32] above).

178 Where a statement is made or an act is performed in reliance on a settled understanding of the law which is later overturned by subsequent judicial decision, the issue of whether the statement or act was "wrong" or "mistaken" can be a vexed question. In the domain of unjust enrichment, it has been held that where a payment is made in reliance on a settled understanding of law which is later, *after the time of payment*, overtaken by subsequent judicial pronouncement, that payment was made "under a mistake of law" at the time of payment, and is therefore liable to be repaid. This was the conclusion of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 ("*Kleinwort Benson*"). The appellant bank in that case entered into various interest rate swap agreements with four respondent local authorities. After these agreements were entered into, a House of Lords decision, *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 ("*Hazell*"), declared that such interest rate swap agreements with local authorities were *ultra vires* and void. The appellant bank sought to recover moneys paid over to the respondent local authorities on the basis that they had been paid under a mistake of law. The House of Lords allowed the appellant's appeal by a three-to-two majority. The majority held that by virtue of the principle of retrospectivity, the law applicable *at the date of the payments* was that such

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interest rate swap agreements were *ultra vires* and void, notwithstanding that this position was only established in *Hazell* subsequently (see *Kleinwort Benson* at 379 *per* Lord Goff of Chieveley). It followed that the appellant bank was operating under a mistake of law when it paid the sums over to the respondent authorities.

179 The example of *Kleinwort Benson* is, however, of limited assistance in this case given that it involves the specific context of unjust enrichment which carries with it unique considerations (see, *eg*, the judgment of Lord Hoffmann who suggested that it was inappropriate to consider "what counts as a mistake in too abstract a way, divorced from its setting in the law of unjust enrichment" (*Kleinwort Benson* at 398)). A further point of distinction is that in *Kleinwort Benson*, the parties had never subjected their dispute to prior litigation. In fact, their "settled understanding of law" that the interest rate swap agreements were *intra vires* and valid was not based on any prior judicial decision at all. In contrast, in the present case, the MCST and Lee Tat had been through *prior litigation*, the upshot of which was to suggest that the MCST did enjoy the Right of Way. In other words, the MCST had made the Statements relying, *not merely* on some abstract principle of law, but on the strength of the decisions in the First, Second and Fourth Actions.

180 In our view, it is presently unnecessary to decide whether the Statements were false because, as we shall explain, the element of malice is not made out in any event. In the circumstances, we shall not express a definite view on the matter. Nevertheless, we would make the passing observation that the Judge's view that the Statements were not false is consistent with the principle of finality, which requires that even erroneous decisions be given due effect (*TT International* at [71]). As we noted in *TT International*, the concern underlying the principle of finality is to give litigants the "assurance that they

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can – indeed *must* – order their affairs on the strength of judicial decisions relating to the matters which they are disputing" [emphasis in original] (at [192]). It would seem antithetical to this idea to hold that the Statements, which reflected and perhaps even relied on, the judicial pronouncements in the Second, Third and Fourth Actions, were false.

181 In any event, even if we take Lee Tat's case at its highest and assume that the 1997 and 2007 Statements were indeed false, Lee Tat's claim for malicious falsehood would still fail because malice is not made out.

Malice

182 Malice is made out if (a) the defendant in publishing the falsehood was motivated by a dominant and improper intention to injure the plaintiff or (b) the defendant did not honestly believe that the statement was true or has acted with reckless disregard as to the truth of the statement (see the High Court decision of *Maidstone Pte Ltd v Takenaka Corp* [1992] 1 SLR(R) 752 ("*Maidstone*") at [48]–[49], citing the House of Lords decision of *Horrocks v Lowe* [1975] 1 AC 135 at 149–151).

183 Lee Tat argues that the making of the Statements was malicious because the MCST "had contrived to ensure that the [Extension] Issue was never decided" and then "made false Statements to the public … which it knew (or ought to have known) would, and did have, a tangible adverse effect on Lee Tat's ability to develop its land".

184 To begin with, Lee Tat has not even made clear whether it is suggesting that the MCST was acting with a dominant and improper motive to injure Lee Tat, or whether it is suggesting that the MCST did not honestly believe in the truth of the Statements. Either way, Lee Tat's claim must fail. There is no

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evidence to suggest that the MCST's dominant intention was to injure Lee Tat. Lee Tat claims that the MCST "knew (or ought to have known) [that the alleged falsehoods] would, and did have, a tangible adverse effect on Lee Tat's ability to develop its land", but the fact that a defendant knows that the publication would injure the plaintiff is insufficient to establish malice (*Maidstone* at [49]). In so far as Lee Tat's claim hinges on the assertion that the MCST did not honestly believe in the truth of the Statements, we reject that assertion. As stated above, we agree wholly with the Judge that the "weight of judicial authority" at the material times was in favour of the MCST enjoying a right of way over the Servient Tenement. This militates against any suggestion that the MCST could not have had an honest belief in the truth of the Statements (even if it was a mistaken one).

185 For this reason, we uphold the Judge's decision to dismiss Lee Tat's claim for malicious falsehood.

Issue 4: Trespass

186 We begin by noting that Lee Tat's claim in trespass is necessarily limited to the period between 24 December 2006 and 1 December 2008. The Judge found that these were the only dates not excluded by virtue of s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed) (see the Judgment at [119]), and that finding has not (correctly, in our view) been challenged on appeal.

187 In its written submissions, Lee Tat argued that the Judge was wrong to hold that the issue of Grange Heights residents' entitlement to use the Servient Tenement was *res judicata* because of the Court of Appeal's decision in the Fourth Action. According to Lee Tat, the Court of Appeal decided as it did in the Fourth Action only because it was *misled* by the MCST that the Extension

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Issue had already been decided in the Second Action. Lee Tat contended that to allow the MCST to benefit from the judgments in the Fourth Action by excusing it from liability for trespass would be to allow the MCST to gain an advantage by its own wrong.

188 The above argument was not pursued by Lee Tat in oral submissions. Instead, learned counsel for Lee Tat, Mr Chelva Rajah SC ("Mr Rajah"), adopted a different approach, which focused the attack on the Judge's holding that "the benefits that accrued as a result of the First, Second and Fourth Actions are not liable to be disgorged as damages for trespass **as a result of the application of the *Arnold* exception**" [emphasis added] (see the Judgment at [132]). Mr Rajah argued that this was wrong because the decision in *Grange Heights (No 3) (CA)* was not based on only the *Arnold* exception. Instead, it was also based on findings that the Extension Issue was not *res judicata*, and (the court deciding this issue afresh) that Grange Heights residents were not entitled to use the Right of Way to access Grange Road. In this regard, Mr Rajah relied on the following passage from *Grange Heights (No 5) (CA)* (at [26]), where this court summarised the decision in *Grange Heights (No 3) (CA)* as follows:

> On 1 December 2008, the 2008 [Court of Appeal] delivered its judgment in [*Grange Heights (No 3) (CA)*] and allowed Lee Tat's appeal on **three separate and distinct grounds**, namely (see [*Grange Heights (No 3) (CA)*] at [111]):
>
> > (a) The [Extension Issue] (…) was not *res judicata* as a matter of law as it had never been decided on the merits by the courts in the previous proceedings from [*Grange Heights (No 1) (HC)*] to [*Grange Heights No 3 (HC)*]. Thus, Lee Tat was not estopped from raising the [Extension Issue].
> >
> > (b) The Majority Judge's decision in the 2005 appeal – *viz*, that the [Extension Issue] was *res judicata* – was an egregious error, and there was sufficient similarity between the circumstances in the Third Action and the circumstances in the House of Lords case of [*Arnold*] to

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> warrant applying the [*Arnold* exception] to the Majority Judge's decision.
>
> (c) The Residents were not entitled to use the Right of Way for access between Grange Road and Lot 561 because of the *Harris v Flower* principle…They were also not entitled to use the Right of Way for access between Grange Road and Lot 111-34 as the easement had been extinguished by operation of law *vis-à-vis* that lot.
>
> [emphasis added in bold]

189 Mr Rajah stressed that this passage showed that the Court of Appeal in *Grange Heights (No 3) (CA)* had revisited the issue of the disputed Right of Way based on two other grounds that were "separate and distinct" from the *Arnold* exception. This was significant because in *TT International* at [190], this court held that in order for the *Arnold* exception to be met, "there can be no attempt to claw back rights that have accrued pursuant to the erroneous decision or to otherwise undo the effects of that decision". Applying this principle, the Judge dismissed Lee Tat's claim in trespass on the basis that the *Arnold* exception did not permit the reopening or undoing of *Grange Heights (No 4) (CA)* (see the Judgment at [131]). However, Mr Rajah argued that the Judge had erred in reasoning this way, because quite apart from the *Arnold* exception, the Court of Appeal in *Grange Heights (No 3) (CA)* had overruled *Grange Heights (No 4) (CA)* on the separate basis that the Extension Issue had not been decided. Thus, Mr Rajah submitted that Lee Tat was not subject to the restriction to the effect that there could be no attempt to claw back rights that had accrued pursuant to the decisions in the Fourth Action.

190 We shall first address this argument which Mr Rajah made in oral submissions before we turn to discuss the argument made on behalf of Lee Tat in its written submissions – *ie*, that the MCST misled the courts in the Fourth Action and cannot be allowed to benefit from its own wrong. Before we turn to our analysis of these arguments, however, it is necessary to clarify a point

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concerning the decision of this court in *TT International*, in light of certain submissions advanced on behalf of the MCST.

The effect of TT International

191 The MCST argues that in so far as Lee Tat's claim in trespass is premised on the decision in *Grange Heights (No 3) (CA)*, it is unsustainable because the Court of Appeal in *TT International* has held that the Third Action was "wrongly decided". The MCST goes so far as to argue that the Second and Fourth Action have been "effectively restored". It relies on the following observations in *TT International* at [191]:

> It follows that, in our judgment, [*Grange Heights (No 3) (CA)*] was, with respect, **wrongly decided**. It was held by the 2008 [Court of Appeal] in that case that, since the majority in the 2005 [Court of Appeal] had not decided the Main Issue of whether Grange Heights residents and visitors had a right of way over the Servient Tenement on the merits, [*Grange Heights (No 4) (CA)*] … could not give rise to issue estoppel on that issue (at [82]). But, in our view, **that sidesteps impermissibly the true issue estoppel created by the decision of the majority in the 2005 [Court of Appeal]:** the majority held that Lee Tat was estopped by the earlier decisions of Coomaraswamy J and the 1992 [Court of Appeal] from arguing that Grange Heights residents and visitors did not enjoy a right of way over the Servient Tenement. Even if the majority in [*Grange Heights (No 4) (CA)*] might have erred in so ruling, that error did not affect the position that Lee Tat remained estopped from arguing in later proceedings that Grange Heights residents and visitors did not enjoy such a right of way. [emphasis added in bold]

192 In *TT International*, we acknowledged that "it may seem ironic that we are overruling a past decision of this court in the name of finality" (at [192]). What is perhaps even *more* ironic is that our decision in *TT International*, which emphasised the principle of finality, has now been relied upon by the MCST as a basis for denying the final effect of *Grange Heights (No 3) (CA)*. We therefore take this opportunity to clarify that when we in *TT International* commented on *Grange Heights (No 3) (CA)* and held that it was wrongly decided, we *did not*

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intend to revise the outcome of that decision as between the parties. We therefore reject the MCST's suggestion that the decisions in the Second and Fourth Actions have effectively been restored. Indeed under the law as laid out in *TT International*, notwithstanding any errors that may have been made in the course of the decision, this court's conclusions in *Grange Heights (No 3) (CA)* stand, and are final. Lee Tat's claim in trespass must be approached on that basis. It would be antithetical to *TT International* itself to hold otherwise. Thus, notwithstanding our remarks in *TT International*, the conclusions reached by this court in *Grange Heights (No 3) (CA)* remain final and binding upon the parties. The question at the heart of Lee Tat's claim in trespass is whether Lee Tat is estopped from pursing that claim, in light of the findings in the Fourth and the Third Actions. We therefore turn to address Mr Rajah's oral submissions on this point.

Lee Tat is estopped from pursuing the claim in trespass

The argument that the decision in Grange Heights (No 3) (CA) was not only based on the Arnold *exception*

193 In our view, Mr Rajah's argument, in so far as it focuses on the fact that the decision in *Grange Heights (No 3) (CA)* was not solely based on the *Arnold* exception, is somewhat imprecise. A careful reading of the Judge's reasons suggests that the *Arnold* exception was central to his dismissal of the trespass claim *not* because it formed the basis of the decision in *Grange Heights (No 3) (CA)*, but because, in his view, it formed the *only possible basis on which he could undo the effects* of *Grange Heights (No 4) (CA)*. That is demonstrated by the following passage of the Judgment (at [131]): "By suing the MCST in trespass, Lee Tat **sought to undo the effect of *Grange Heights (No 4) (CA)*. The *Arnold* exception does not entitle it to do so.**" [emphasis added]. In other words, the *Arnold* exception was relevant because to allow Lee Tat's claim in

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trespass would be to unwind the effects of *Grange Heights (No 4) (CA)* and, in the Judge's view, this could only be permissible if Lee Tat could bring itself within the *Arnold* exception.

194 It follows that the grounds on which this court in *Grange Heights (No 3) (CA)* set aside the decision in *Grange Heights (No 4) (CA)* are not strictly relevant. Mr Rajah's argument does, however, raise an interesting question – is the *Arnold* exception, or more generally the doctrine of *res judicata*, applicable here at all? The doctrine of *res judicata* ordinarily attaches finality to "a decision pronounced by a judicial … tribunal with jurisdiction over the cause of action and the parties, which disposes once and for all of the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment" (see the definition of *res judicata* in K R Handley, *Spencer Bower and Handley*: *Res Judicata* (LexisNexis, 4th Ed, 2009) ("*Spencer Bower and Handley*") at para 1.01). Yet, the Court in *Grange Heights (No 3) (CA)* found that the Extension Issue had never been decided on the merits and thus reopened and effectively set aside the decision in *Grange Heights (No 4) (CA)*. Arguably, that decision no longer comes within the definition of a *res judicata* – it did not dispose of the "fundamental matters" once and for all. Those matters were *in fact* re-litigated between the parties in the Third Action, and were revisited on the basis that certain issues thought to have been decided between the parties were never actually decided after all. Why, then, should Lee Tat be estopped from challenging or undoing *Grange Heights (No 4) (CA)* by arguing that Grange Heights residents never had a right to interfere with the Servient Tenement, and were therefore trespassing between 24 December 2006 and 1 December 2008?

195 In our view, there are two reasons why Lee Tat is estopped from pursuing its claim in trespass by virtue of the decision in *Grange Heights*

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(No 4) (CA). Before we explain these reasons we emphasise that our decision on this point must be viewed within the *highly exceptional and unusual* facts of this particular case. The winding course of the dispute between Lee Tat and the MCST has given rise to a unique set of circumstances, the likes of which will probably not be seen again. It is extremely unusual that a matter, having been pursued to the furthest extent thought possible within the judicial system (*ie*, to an appeal to its apex court) would subsequently be reopened by a later sitting of that same court, on the basis of an alleged error by the earlier court. Indeed, the principles of finality as pronounced by this court in *TT International* – including the rule that even erroneous decisions must be given effect, and the narrowly confined exceptions to cause of action and issue estoppel – are intended to avoid precisely this type of situation, in which a final decision of the highest court is subsequently upended, giving rise to uncertainty and conflicting judgments. Bearing these considerations in mind, we find that Lee Tat is *not* entitled to pursue its claim in trespass for the following reasons.

196 First, while this court in *Grange Heights (No 3) (CA)* set aside the decision in *Grange Heights (No 4) (CA)* on the basis that the Extension Issue had never been decided, we have established in *TT International* that this was the wrong course because it "sidesteps impermissibly the true estoppel created by the decision of the majority in the [Fourth Action]" – *ie*, that Lee Tat was estopped from disputing the MCST's Right of Way by virtue of the findings in the Second Action (see *TT International* at [191]). Perhaps somewhat ironically, the doctrine of finality requires that we must give effect to *Grange Heights (No 3) (CA)*, even though we have established that the Court's decision to set aside *Grange Heights (No 4) (CA)* was wrong. That means that the Court of Appeal's decision in the Third Action to review the Extension Issue afresh, and the consequence of that review – which was to recognise that the MCST had no

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Right of Way over the Servient Tenement – cannot be reversed or questioned anymore. The MCST cannot, for example, seek to have the finding that it was not entitled to the Right of Way set aside on the basis that the issue was wrongly re-litigated in the Third Action. *However*, in so far as we have established that the Court in *Grange Heights (No 3) (CA)* was wrong to have found that no issue estoppel arose from the Fourth Action, there is no reason to perpetuate this error further by allowing Lee Tat to reach back in time to try to impose liability on the MCST for acts done in the interim period between *Grange Heights (No 4) (CA)* and *Grange Heights (No 3) (CA)*. This is closely related to our second point.

197 Our second point is this: Underlying the Judge's analysis of Lee Tat's claim in trespass, and in particular his consideration of the *Arnold* exception, was the assumption that the decision in *Grange Heights (No 4) (CA)* enjoys *some* measure of finality, notwithstanding that it was overturned in *Grange Heights (No 3) (CA)*. The effect of that measure of finality is to enable the MCST *now* to rely on *Grange Heights (No 4) (CA)* as representing the prevailing and definitive authority on the parties' rights during the period 24 December 2006 and 1 December 2008 notwithstanding that that decision was subsequently overruled by *Grange Heights (No 3) (CA)*. This explains why, in the Judge's view, "the benefits that accrued as a result of the First, Second and Fourth Actions are not liable to be disgorged" (see the Judgment at [132]). We agree with the Judge, but we consider it necessary to explain why we are of the view that *Grange Heights (No 4) (CA)* enjoys a measure of finality.

198 To begin with, we accept that the effect of *Grange Heights (No 3) (CA)* on the parties' substantive rights must be taken "to be unbounded by time and to have both retroactive and prospective effect" (see the recent decision of this court in *Adri Anton Kalangie v Public Prosecutor* [2018] 2 SLR 557 ("*Adri*

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Anton Kalangie") at [27], citing the discussion of the retroactivity of judicial pronouncements in *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [100]). The Judge recognised this point in stating that "*Grange Heights (No 3) (CA)* is still retroactive in that the [Right of Way] must be taken to have extinguished at the point in time when Lots 111-34 and 561 were amalgamated." (see the Judgment at [132]). On what basis, then, can the MCST rely on *Grange Heights (No 4) (CA)* to resist Lee Tat's assertion of its rights (to undisturbed use and enjoyment of its land) in respect of the period 24 December 2006 to 1 December 2008, given that Lee Tat's rights arise from a contradictory judgment in *Grange Heights (No 3) (CA)* which is also applicable to that time period?

199 In our view, the measure of finality which the judgment in *Grange Heights (No 4) (CA)* enjoys may be explained in the following way. The court must squarely confront the fact that it is now faced with two conflicting apex court judgments which are, in theory, both applicable to exactly the same parties during exactly the same time period in respect of exactly the same subject matter. However, this conflict, as we shall see, is more apparent than real. Even though one of those judgments, *ie*, *Grange Heights (No 3) (CA)*, is, *in fact*, the only final judgment – in so far as it was the "last word" on the matter – *both* judgments are, *at law*, equally "final" in that they both, at the time they were issued, had the requisite character of *res judicatae*. To elaborate, whilst *Grange Heights (No 3) (CA)* relates to the *general* legal position on the matter, *Grange Heights (No 4) (CA)* nevertheless retains a measure of finality in so far as it relates to the acts that took place during the period between the handing down of that decision itself and the handing down of the decision in *Grange Heights (No 3) (CA)*.

200 In this last-mentioned regard, we highlight certain salient facts about the Court of Appeal's judgment in the Fourth Action: There is no doubt that the

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court in *Grange Heights (No 4) (CA)* applied its mind to the question whether the MCST was entitled to use the Right of Way. There is also no doubt that that question was argued before the court. The majority concluded that the MCST *was* entitled to use the Right of Way by holding that the question had already been decided in an earlier decision – *ie*, the Second Action (*Grange Heights (No 4) (CA)* at [14]–[16]), and that the change in Lee Tat's status from owner of two dominant tenements to the owner of the Servient Tenement made no difference to the MCST's Right of Way (at [16]). No one has suggested that the court was not entitled to arrive at that conclusion in the manner that it did, even though the substance of that conclusion proved later to be wrong. Nor has anyone disputed that everybody at that time believed that that was what the court decided and was entitled to decide. In sum, the process by which the highest court in this jurisdiction arrived at its decision in *Grange Heights (No 4) (CA)* cannot reasonably be impugned, nor could its substance have been reasonably misunderstood.

201 The question, then, is which of what appear to be two equally final judgments should now be given effect as between Lee Tat and the MCST in respect of the interim period between the decision in *Grange Heights (No 4) (CA)* and *Grange Heights (No 3) (CA)*? The answer will not readily be found within a conventional application of the doctrine of *res judicata* because that doctrine is not designed to accommodate the situation where there are apparently *two* conflicting judgments which are *equally final*. Indeed, that is the exact quandary which the doctrine is designed *to avoid, not to resolve*. One therefore must look *beneath* the conventional contours of the doctrine of *res judicata* – beyond its concepts and theoretical constructs – at its axiomatic rationale. That rationale is that parties must be able to *order their affairs on the strength of judicial pronouncements*. That expression, which we employed in

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TT International at [192], constitutes the heart of the meaning of finality. And this rationale is by no means unfamiliar to the law. As this court recently held in a cognate but distinct area of the law relating to the effect of judgments, it is one of the reasons why there is no absolute rule that judgments have retroactive effect (see *Adri Anton Kalangie* at [30] *per* Sundaresh Menon CJ). To be clear, we are not saying that *Grange Heights (No 4) (CA)* has no such effect, as we have indicated at [198] above.

202 That rationale can lead to only one answer when the court is concerned with liability – as between Lee Tat and the MCST – for the acts that took place from 24 December 2006 to 1 December 2008. Logically, it cannot be that the court must give effect to the judgment in *Grange Heights (No 3) (CA)*, because that decision lay in the future and parties could not possibly order their affairs on the strength of it. The court can only give effect to the judgment in *Grange Heights (No 4) (CA)* for that decision, though no longer in effect *today*, was the only judgment upon which the parties could order their affairs during that time period. It follows that the MCST was entitled to "order their affairs on the strength of" the decision in *Grange Heights (No 4) (CA)*.

203 That expression is the normative basis for the right that the MCST is now entitled to assert, and there is no reason why Lee Tat should be permitted to impugn that right. Again, we stress that this must be seen in light of the exceptional facts of this case and, in particular, the fact that the MCST had pursued the matter to the highest court in the land. The same reasoning would *not* apply if, hypothetically, we were concerned with acts of trespass that took place in an interim period between a judgment of a lower court and the subsequent overturning of that judgment in a higher court. On the present facts, however, *Grange Heights (No 4) (CA)* may have been stripped of its substance on the more general plane, but the legitimacy of its effect on the parties during

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the period between 24 December 2006 and 1 December 2008 cannot reasonably be questioned, *even now*, and in that sense, it preserves a measure of finality to this day. It would be wholly inimical to the spirit behind the doctrine of *res judicata* to say that the MCST, having relied on the force of the decision in *Grange Heights (No 4) (CA)*, could nevertheless be liable for trespass from 24 December 2006 to 1 December 2008. We therefore see no reason to disturb the Judge's finding that Lee Tat cannot now try to disgorge the benefits which Grange Heights residents enjoyed as a result of the findings in the Fourth Actions. That leaves us the task of discussing Lee Tat's argument that the MCST obtained the judgment in the Fourth Action by misleading the Court, and cannot be allowed to benefit from its own wrong.

The argument that the MCST cannot be allowed to benefit from its own wrong

204 In substance, Lee Tat's case is that the principle that one cannot gain an advantage by his own wrong renders the doctrine of *res judicata* inapplicable. Put another way, Lee Tat is trying to carve out *another* exception to issue estoppel and to undermine the final effect of *Grange Heights (No 4) (CA)*.

205 In *TT International*, we foreclosed the possibility that other exceptions to issue estoppel exist (at [193]) – apart from fraud or collusion, and of course, the *Arnold* exception. To buttress the argument that the MCST cannot be allowed to rely on *Grange Heights (No 4) (CA)*, Lee Tat has latched onto remarks made in *Grange Heights (No 5) (CA)* at [99] stating that the MCST "appear[s] to have deliberately suppressed (by omission) the fact that its submissions on the *Harris v Flower* issue in [the Fourth Action] appeal … were contradictory to its submissions on that same issue in the [Second Action] appeal". It says that the MCST obtained the judgment in its favour in *Grange Heights (No 4) (CA)* only through "its egregious misconduct in misleading the

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Court", but it stops short of alleging fraud or collusion. The difficulty for Lee Tat is that in order for the doctrine of *res judicata* to be rendered inapplicable, "[t]here must be *actual fraud*, that is conscious and deliberate dishonesty, and the judgment must be obtained by it" (*Spencer Bower and Handley* [emphasis added] at para 17.03, citing the Court of Appeal in Chancery decision of *Patch v Ward* (1867) LR 3 Ch App 203 at 207). Lee Tat has no evidence whatsoever of actual fraud, or conscious and deliberate dishonesty. It only has the dicta in *Grange Heights (No 5) (CA)* which states in *tentative terms* that the MCST *may* have deliberately suppressed the contradictory positions which it took in the Fourth Action and the Second Action, but that will not suffice.

206 Moreover, the requirement is that the judgment must be obtained *by* the fraud. Yet as the Judge noted (see the Judgment at [69]), even if it were true that in the Fourth Action proceedings, the MCST deliberately suppressed the fact that it had, in the Second Action, raised the argument that Lee Tat lacked *locus standi* to raise the Extension Issue, it could not be said that it *obtained* the outcome of the Fourth Action *by* such dishonesty. Lee Tat itself asserted in the Fourth Action that it did not have *locus standi* to raise the Extension Issue in the Second Action, and this was a point noted by the majority (*Grange Heights (No 4) (CA)* at [13]), even though the majority disagreed with it. Further, in Chao JA's dissent, he noted that Lee Tat had been involved in the First and Second Actions in a different capacity as compared to the Fourth Action, because at that time it was not yet the owner of the Servient Tenement (*Grange Heights (No 4) (CA)* at [66]). He also specifically noted the submissions advanced on behalf of Lee Tat that it *could not have raised* issues in the First and Second Actions which the owner of the Servient Tenement could (*Grange Heights (No 4) (CA)* at [67]). In other words, the argument that the Extension Issue had not actually been decided in the Second Action because Lee Tat did

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not, at the time, have *locus standi* to raise it was fully ventilated notwithstanding any purported attempt by the MCST to suppress this fact. In the circumstances, it is clear that the MCST's failure to highlight this fact did not in any way affect the outcome of the decision in the Fourth Action on appeal. Clearly, then, the decision in *Grange Heights (No 4) (CA)* cannot be said to have been obtained by wilful suppression, let alone by any fraud or collusion on the MCST's part.

207 Finally, and for completeness, we would also note that Lee Tat cannot avail itself of the *Arnold* exception. The *Arnold* exception is premised on the following conditions identified in *TT International* at [190]:

> (a) the decision said to give rise to issue estoppel must directly affect the *future* determination of the rights of the litigants;
>
> (b) the decision must be shown to be clearly wrong;
>
> (c) the error in the decision must be shown to have stemmed from the fact that some point of fact or law relevant to the decision was not taken or argued before the court which made that decision *and* could not reasonably have been taken or argued on that occasion;
>
> (d) there can be no attempt to claw back rights that have accrued pursuant to the erroneous decision or to otherwise undo the effects of that decision; and
>
> (e) it must be shown that great injustice would result if the litigant in question were estopped from putting forward the particular point which is said to be the subject of issue estoppel – in this regard, if the litigant failed to take advantage of an avenue of appeal that was available to him, it will usually not be possible for him to show that the requisite injustice nevertheless exists.
>
> [emphasis in original]

208 Quite clearly, these conditions are not satisfied in the present case. The decision said to give rise to an issue estoppel – *ie*, *Grange Heights (No 4) (CA)* – obviously does *not* directly affect the *future* determination of the rights of the litigants, because it has been reversed by virtue of *Grange Heights (No 3) (CA)*.

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Furthermore, Lee Tat is clearly trying to "claw back rights that have accrued pursuant to [the decision in *Grange Heights (No 4) (CA)*] or to otherwise undo the effects of that decision" by seeking to make the MCST liable in trespass for Grange Heights residents' use of the Servient Tenement prior to December 2008.

209 For these reasons, we also uphold the Judge's decision to disallow Lee Tat's claim in trespass.

Conclusion

210 For the reasons set out above, we dismiss the appeal.

211 Unless the parties are able to come to an agreement on costs, they are to furnish, within 14 days, written submissions limited to 10 pages each, setting out their respective positions on the appropriate costs orders for this appeal.

212 We observe that we commenced the present judgment by noting a general irony embodied in the present proceedings – that a bitterly fought dispute over several decades between two parties who have nothing but personal ill will towards each other has engendered (for Singapore law) questions of the first importance in relation to the development of the common law in general and tort law in particular. At this juncture, we note that, having arrived at our decision, we have also avoided a *further* potential irony: If we had, as Lee Tat has urged, recognised the torts of malicious prosecution or abuse of process, *but* had found against Lee Tat on the relevant facts (as we indeed have done), then Lee Tat would by its own hand have sown the seeds of future proceedings against it by the MCST based on these *very same* torts. Such proceedings could have gone on *ad infinitum* with the parties taking turns to play plaintiff. And this possibility would not have been merely theoretical given the acrimonious

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relationship between Lee Tat and the MCST that has *already* stretched across more than four decades. As it turns out, this point is now moot since we have held that the aforementioned torts ought *not* to be recognised in the Singapore context. However, it also demonstrates – in a more concrete fashion – some of the many (at least potential) pitfalls that might have emerged if these torts had been recognised.

213 Finally, we would like to express our deepest appreciation to Prof Chan for his invaluable assistance. Although we did not ultimately agree with all of his submissions, they were extremely comprehensive and constituted a masterly survey of all the relevant case law and materials across all the relevant common law jurisdictions.

Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal

Chao Hick Tin Senior Judge	Chan Seng Onn Judge

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